TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 351

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH, AND GEORGE B. COOKSEY, AS EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF DAVID DOWS, SENIOR, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

THEODORE P. GILMAN, COMPTROLLER OF THE STATE OF NEW YORK, AND BIRD S. COLER, COMPTROLLER OF THE CITY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED JUNE 20, 1901.

(18,204.)

(18,204.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 351

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH, AND GEORGE B. COOKSEY, AS EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF DAVID DOWS, SENIOR, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

THEODORE P. GILMAN, COMPTROLLER OF THE STATE OF NEW YORK, AND BIRD S. COLER, COMPTROLLER OF THE CITY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

INDEX.

	Original.	Print.
Papers on appeal from appellate division	*a*	1
Statement	*b*	1
Stipulation as to papers before the surrogate	1	1
Petition	2	2
Exhibit A—Will of David Dows, Senior	5	3
Exhibit B—Will of David Dows, Junior, third paragraph	18	11
Order appointing appraiser	22	13
Report of appraiser	23	14
Objections filed with appraiser	34	20
List of stocks referred to in objection IV (the same being stocks in incorporated companies liable to taxation on their capital)	40	24
Order assessing tax	42	25
Notice of appeal to surrogate	44	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 20, 1901.

	Original.	Print
Order of surrogate from which appeal was taken to appellate division	51	29
Notice of appeal to appellate division (executors)	52	30
Notice of appeal to appellate division (guardians)	54	31
Affidavit of no opinion	55	31
Certificate of clerk of surrogate's court	56	32
Order of affirmance by appellate division	57	32
Certificate of clerk of appellate division	59	33
Notice of appeal to court of appeals	60	33
Affidavit of no opinion	67	37
Certificate of clerk of surrogate's court	68	37
Opinion of appellate division In matter of Vanderbilt, 50 App. Div., 246	69	38
Remittitur from court of appeals	77	43
Certificate to opinion of court of appeals	79	44
Opinion of court of appeals	80	44
Order on remittitur	87	48
Petition for writ of error	90	49
Allowance of writ of error	92	51
Assignment of errors	94	51
Writ of error	101	55
Citation	104	57
Waiver of service of citation, &c.	106	57

a

Copy — Remittitur from

Court of Appeals of the State of New York.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

Papers on Appeal from Order of the Appellate Division, First Department, Affirming an Order of the Surrogate of New York County Affirming an Order Fixing and Assessing Tax.

Horace E. Deming, attorney for appellants, 11–13 William street, borough of Manhattan, New York city.

Joseph W. Middlebrook, attorney for respondents, 130 West Main street, Tarrytown, N. Y.

b

Statement.

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

This proceeding was begun by the filing of the petition and the entry of the order appointing the appraiser October 31, 1900. The names of the original parties are as follows: The Comptroller of the State of New York and the Comptroller of the City of New York, petitioners, appearing by Joseph W. Middlebrook, their attorney; Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as trustees and executors of the last will and testament of David Dows, Sr., deceased; Tracy Dows and Richard M. Hoe, as executors of the last will and testament of David Dows, Jr., deceased; and Tracy Dows and Richard M. Hoe as guardians of David Dows, 3d, Robert Dows and Kenneth Dows appearing by Horace E. Deming, their attorney. There has been no change of parties or attorneys.

1

Stipulation.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of DAVID DOWS, SENIOR, Deceased.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that there is no dispute as to the facts appearing before the appraiser, and that the following printed copies of the papers on file contain all the facts upon which arise the matters in controversy and shall constitute all the papers upon which shall be heard the appeal to the surrogate from the report of

as well as in the house, or on the premises occupied by me as a summer residence at Irvington, in Westchester county in the State of New York and known as Charlton Hall. I also give and bequeath to my said wife the sum of fifty thousand dollars ($50,000) to be paid to her within one calendar month after my decease. I also give and bequeath to my said wife the sum of four hundred thousand dollars ($400,000), and I direct, that, so soon as practicable after my decease, the said sum be paid to her out of my estate and that in the meantime and until said sum be so paid she receive quarterly out of my estate interest upon said sum at the rate of four and one-half per cent. annually.

6 Third:—I give and devise unto my executors hereinafter named, (or to such of them as may qualify), and the survivors and survivor of them and the successors to their trust, and I hereby direct that the title to the same shall, from and after my decease, be vested in my said executors and the survivors and survivor of them and the successors to their trust, the premises where I now reside in the city of New York, on the corner of Fifth avenue and Sixty-ninth street in the said city, together with the outbuildings and the lots of land on which the same are built and all things appurtenant, as well as the premises at Irvington, Westchester county in the State of New York, known as Charlton Hall, with the buildings, improvements and all things thereunto appurtenant in trust to hold the same to and for the use of my said wife and of any others or other of my family whom she may request to reside with her, so long as my said wife shall live; and I give and grant unto my said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust full power and authority to grant, bargain, sell and convey said premises, or either of them, or any part thereof, upon such terms and in such manner as in their discretion may seem wise and either at public or private sale, provided however, that if such sale be made during the lifetime of my said wife her consent thereto must first be obtained, such consent to be evidenced by her joining in the deed or deeds of conveyance. The proceeds of such sale shall be and become part of my residuary estate and shall be subject in all respects, as to their disposition, to the provisions and requirements in respect to my residuary estate as set forth hereinafter in this my will.

7 Fourth:—I hereby require and direct that so soon as practicable after my decease, there shall be set apart out of my estate and invested a sum or sums, not to exceed, however, in the aggregate two hundred and fifty thousand dollars ($250,000) the income of which shall be used to pay the expense of keeping the premises described in the preceding (third) paragraph of this my will in good tenantable order and repair and to pay all taxes and assessments as well as expenses for insurance upon said premises during the lifetime of my said wife, unless said premises be sooner sold; the surplus if any, of income, over and above such expenses, to be reinvested and become part of the principal of said fund so set apart. Upon the death of my said wife, or upon the sale of said premises, prior to her decease, said fund, with all accumulations

thereof, shall be and become part of my residuary estate and shall be subject in all respects, as to its disposition, to the provisions and requirements in respect to my residuary estate as set forth hereinafter in this my will.

Fifth:—I give and bequeath to my son, David Dows, Jr., any and all advancements made to him, which are, or shall be charged on my books to him as an advancement on account of his interest in my estate. I also give and bequeath to my son, David Dows, Jr., the sum of four hundred thousand dollars ($400,000) and I direct that so soon as practicable after my decease the said sum be paid to him out of my estate, and that in the meantime, and until said sum be so paid, he receive quarterly out of my estate interest upon said sum at the rate of four and one-half per cent. annually. But if my said son die before me leaving children, or the issue of his deceased children him surviving I give and bequeath said sum of four hundred thousand dollars ($400,000) free and clear of any and all claims because or by reason of any advancements made to my said son in his lifetime on account of his interest in my estate to said children
8 of my said son share and share alike, and to said issue of his deceased children (such issue to take share and share alike the portion which the parent would have received by the terms hereof if living) to be paid to them as each attains the age of twenty-five years, together with all accumulations of interest, income and profits.

"Sixth:—I give, bequeath and devise the property hereinafter and in this sixth paragraph of this my will mentioned and described unto my executors hereinafter named (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust and I hereby direct that the title to the same shall, from and after my decease, be vested in my said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust to have and to hold the same in trust, subject to the conditions and qualifications hereinafter contained, with power, during the continuance of such trust, to collect and receive the rents, income and profits, to manage, repair, build, rebuild and improve said property in their discretion (the expenses incident to the performance of such trust to be paid out of the rents, income and profits of said property) and to pay the surplus of said rents, income and profits over and above said expenses to my son David Dows, Jr., from time to time as the same accrue during his lifetime. And upon the death of my said son the said property with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may, by his last will and testament designate and appoint and in such manner, and upon such terms, as he may legally impose. But in case my said son, David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike,
9 and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have re-

ceived by the terms hereof if living) to be paid to them at the times and in the proportions following, to wit: As each attains the age of twenty-one years there shall be paid to him or her a sum not to exceed fifty thousand dollars ($50,000); as each attains the age of twenty-five years a further sum not to exceed one hundred thousand dollars ($100,000); as each attains the age of thirty years the remainder, if any, of the share of said property, with all accumulations of interest, income and profits to which he or she may be entitled; excepting, however, that the said children of my said son David Dows, Jr., and the said issue of his deceased children shall, each of them, receive from such share or portion of the property as is herein by this paragraph numbered sixth of this my will provided shall vest absolutely in such child, or issue of a deceased child, the entire income after he or she shall have attained the age of twenty-one years. And in case my said son David Dows, Jr., die leaving no children him surviving, nor issue of deceased children, then said property shall vest absolutely and at once upon his decease, share and share alike, in my wife Margaret E. Dows, if she survive him, and the brothers and sisters of my said son, David Dows, Jr., him surviving and the lawful issue of his deceased brothers and sisters (such issue to take share and share alike the portion which the parent would have received by the terms hereof if living) subject to the same provisions as to times and proportions of payment of the principal and income of their respective shares as are hereinbefore provided in the case of the children and the issue of the deceased children of my said son David Dows, Jr.

And I give and grant unto my said executors (or to such of them as may qualify) and the survivors or survivor of them and the successors to their trust full power and authority to mortgage, grant, bargain, sell, and convey the said property, or any part thereof, or lease the same, or any part thereof, for a period not to exceed twenty years, upon such terms, and in such manner as in their discretion may seem wise, provided my said son, David Dows, Jr., consents thereto, such consent to be evidenced by his joining in the deed of conveyance or other instrument. And in case of such sale the proceeds thereof shall be invested to and for the use of my said son, David Dows, Jr., during his life in realty or otherwise, and in such manner as in the discretion of my said executors (or such of them as may qualify) or the survivors or survivor of them, or the successors to their trust may seem proper; and only the surplus of the rents, income and profits thereof, over and above expenses, shall be paid to my said son David Dows, Jr.; and I hereby give and grant the powers as to the mortgaging, sale and leasing of such realty as may be so purchased which are herein given with respect to the property given, bequeathed and devised by this the sixth paragraph of this my will.

The property given, bequeathed and devised by this, the sixth paragraph of this my will, is the following:

The property known as Columbia stores, now used for grain elevators and storage and including the lots on the corner of Columbia and Pacific streets, not now built upon, all situated in the city

of Brooklyn, county of Kings and State of New York, lying in the block bounded by Atlantic street on the north, the East river on the west, Pacific street on the south and by Columbia street and property of other owners on the east; also the property known as Dows stores, now used for grain elevators and storage, situ-
11 ated in said city of Brooklyn and lying in the block bounded by Columbia street on the east, Pacific street on the north, the East river on the west and on the south by that part of the same block now owned by the estate of Patchen; together with all the land and real estate, buildings and machinery, wharf rights and water rights belonging to each of said above described or mentioned properties and all other appurtenances thereto, excepting, however, two-sixteenths of said several properties which are held by me in trust for my partner, Alexander E. Orr."

Seventh:—To each of my children Annie L., Linda, Margaret W., Susan, Mary and Tracy and the issue of any of my said children who may die before me (such issue to take share and share alike the sum which the deceased parent would have received if living) I give and bequeath the sum of four hundred thousand dollars ($400,000) less, in the case of each child, the amount of any and all advancements made to said child which are, or shall be charged on my books to said child as an advancement on account of his or her interest in my estate, but without reckoning interest on said advancements from the time the same were made or charged; and I direct that so soon as practicable after my decease the amount due to each of my children under this provision of my will be paid to each of my said children, and that in the meantime, and until such payment be made, each of my said children receive quarterly out of my estate, interest at the rate of four and one-half per cent. annually upon the amount due him or her under this provision of my will.

Provided, however, that in the case of such of my children, or the issue of my deceased children, as shall not at the time of my decease have attained the age of twenty-five years the payment of the prin-
12 cipal of the sum herein by this provision of my will given and bequeathed to each such child, or issue of a deceased child shall not be made until he or she shall attain the age of twenty-five years; and provided, further that only so much of the income of said principal shall be paid to such child, or issue of a deceased child, during minority, as shall be requisite for the proper maintenance, education and support of such child in the discretion of his or her guardian; the surplus, if any, of said income, over and above such payments to be invested and become part of the principal.

And I hereby nominate, constitute and appoint my wife Margaret E. Dows guardian of such of my children as shall be minors at the time of my decease during his or her minority, and direct that she shall have the particular custody and care of the person and education of such of my children as are minors, and that her receipt shall be a sufficient voucher for such sums as shall be paid for, or on account of the support, education or use of any of my children during minority without further accountability by any of my executors.

"Eighth:—All the rest, residue and remainder of my estate, of whatsoever name and nature and wheresoever situated, I give, bequeath and devise to my executors hereinafter named (or to such of them as may qualify) and to the survivors and survivor of them and any successors to their trust, and I hereby direct that the title to the same shall, from and after my decease, be vested in my said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust, to have and to hold the same in trust subject to the conditions and qualifications hereinafter contained with full power and authority during the continuance of such trust to collect and receive the rents, income and profits, to grant, bargain, sell, convey, lease, invest, reinvest
13 in realty or otherwise, improve, repair and manage such estate and any part thereof according to their best judgment and discretion and to incur and pay all such expenses in the performance of their trust as in their discretion may seem proper, that is to say:—

One-eighth of my said residuary estate shall be so held in trust as aforesaid, for and during the lifetime of my wife, Margaret E. Dows;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my son, David Dows, Jr.;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter, Annie L. wife of Richard M. Hoe;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter Linda wife of George B. Cooksey;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter, Margaret W., wife of Carroll Dunham;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter Susan wife of Christian A. Herter;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter Mary Dows;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my son Tracy Dows.

And the surplus of the rents, income and profits, arising from each such one-eighth part of my said residuary estate, over and above all expenses, shall be paid over from time to time as the same accrue to the person for, and during whose lifetime said one-eighth part
14 of my said residuary estate is so held in trust as aforesaid, and upon the death of said person said one-eighth part of my said residuary estate, which for and during the lifetime of such person had been so held in trust as aforesaid, shall, with all accumulations of interest, income and profits, vest absolutely and at once in such of his or her children, or the issue of such children as he or she may, by his or her last will and testament designate and appoint, and in such manner and upon such terms as he or she may legally impose; but in case such person dies intestate, then said one-eighth part of my said residuary estate, which had been held in trust as aforesaid

for and during the lifetime of such person, shall thereupon vest absolutely and at once in his or her children, him or her surviving, share and share alike, and the issue of his or her deceased children (such issue to take share and share alike the portion which would have been received by the parent by the terms hereof if living) to be paid to them at the times and in the proportions following, to wit: As each attains the age of twenty-one years, there shall be paid to him or her a sum not to exceed fifty thousand dollars ($50,000); as each attains the age of twenty-five years a further sum, not to exceed one hundred thousand dollars ($100,000); as each attains the age of thirty years the remainder, if any, of the share of said one-eighth part of my said residuary estate with all accumulations of interest, income and profits, to which he or she may be entitled; excepting, however, that said children, and said issue of deceased children, shall, each of them, receive from his or her respective share of said one-eighth part of my said residuary estate which is herein provided shall vest in such child, or said issue of a deceased child, the entire income from and after he or she shall have attained the age of twenty-one years, and during minority such sum or sums not to exceed five thousand
15 dollars ($5,000) in any one year as in the judgment and discretion of his or her guardian may seem right and proper for the maintenance, education and support of such child or said issue of a deceased child.

And in case any person, for and during whose lifetime the one-eighth party of my said residuary estate is held in trust, as aforesaid, dies without children, or the issue of his or her deceased children, him or her surviving, then, and in every such case said one-eighth party of my said residuary estate, with all accumulations of interest, income and profits, shall thereupon vest absolutely and at once, share and share alike in my wife, Margaret E. Dows, if she survives him or her and the brothers and sisters of such person, him or her surviving, and the children of his or her deceased brothers and sisters (such children to take share and share alike the portion which would have been received by the parent by the terms hereof if living) subject to the same provisions as to times, proportions of payment, maintenance, education and support as are hereinbefore provided in the case of the children and the issue of the deceased children of the person for and during whose lifetime said one-eighth part of my said residuary estate is herein directed to be held in trust."

Ninth:—The provisions made by me in this will for my wife shall be taken and accepted by her in lieu of and in full satisfaction for all claims to dower or thirds out of any real or personal estate of which I shall have been or shall be seized or possessed at the time of my death.

Tenth:—I hereby direct that in withdrawing any funds of my estate from any of the partnerships in which I may be interested at the time of my decease due regard be had to the convenience of the surviving partners and I hereby authorize and empower my executors hereinafter named (or such of them as may qualify) and
16 the survivors and survivor of them and the successors to their trust to exercise such regard at the risk of my said estate.

Eleventh:—I hereby nominate and appoint my friends Alexander E. Orr, Benjamin Brewster, my son David Dows, Jr., my sons-in-law Richard M. Hoe and George B. Cooksey, executors of this my last will and testament, and in case any of said persons fails to qualify or dies or resigns then I nominate and appoint in his place and stead my friend William A. Nash and I nominate and appoint my son Tracy Dows to be added when he shall attain the age of twenty-one years as an executor of this my last will and testament and I hereby direct that my said executors be not required to give any security for the performance of their duties and I give and grant to my said executors (or to such of them as may qualify) and to the survivors and survivor of them and the successors to their trust full power and authority in their discretion to sell any stocks or securities which I may hold at the time of my decease or to retain such thereof as they may consider to be a reasonable or safe investment or think it best for any reason to retain as a permanent investment; and full power and authority to do and perform any and all things which may be requisite or proper for the performance of their duties as executors or trustees under the provisions of this my will and I give and grant to such of my said executors as may qualify and to the survivors and survivor of them and the successors to their trust full power to grant, bargain, sell and convey my real estate or any part thereof for such price and on such terms, at public or private sale, as they shall deem best, with power until such sale to improve the same, to repair, build and rebuild and to lease the same upon such terms as they in their discretion may approve, but not for a period longer than twenty years. I further give and grant to my
17 said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust full power and authority to invest and reinvest in their discretion in realty or otherwise my said estate and all accumulations arising from the rents, income and profits thereof, and to purchase, lease, grant, bargain, sell and convey real estate, and in general to manage my said estate subject to the restrictions in this my will contained, according to their best judgment and discretion. And I hereby direct that any of my real estate, save and accept such portions as are mentioned or described in the third and sixth paragraphs of this my will, may be sold and conveyed to pay any or all legacies or bequests in this my will contained.

I further authorize and empower my executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust, whenever by the provisions of this my will, or otherwise, they may hold any real estate in common with any other person or persons, and in their opinion a partition thereof is necessary or advantageous, to make a partition and division of said real estate by deeds of conveyance or by action at law, or otherwise, as they in their discretion may approve.

I further authorize and direct that the act of any four of my said executors in respect to anything which by this my will they are empowered to do shall be as binding as if all my said executors (or

such of them as may qualify) or the survivors or survivor of them or the successors to their trust had united in said act.

And I further authorize and empower any of my said executors, or their successors, by power of attorney, duly executed and acknowledged according to the formalities requisite to entitle an instrument to record, to authorize any of their coexecutors or
18 trustees to do and perform all and every act or thing which they are authorized by the provisions of this my will to do or perform with the same force and effect as if the executor executing such power of attorney personally did and performed such act or thing.

And in case a majority of my said executors (or such of them as may qualify) or the survivors of them or the successors to their trust, assent thereto, such assent to be evidenced by their joining in the deed of conveyance or other instrument I hereby authorize and empower such majority to lease, sell or convey any of my real estate to any other of their coexecutors or cotrustees.

In witness whereof I have hereunto set my hand and seal at the city of New York this eleventh (11th) day of February, one thousand eight hundred and eighty-eight.

DAVID DOWS. [SEAL.]

The foregoing instrument consisting of twenty-three pages and twenty lines was, on the day of the date thereof signed, sealed, published and declared by the said testator as and for his last will and testament in our presence and we, thereupon, at his request, in his presence, and in the presence of each other did sign our names hereunto as subscribing witnesses.

JAS. R. COWING,
119 *State St., Brooklyn, N. Y.*
JAS. L. MITCHELL,
164 *Washington P'k, Brooklyn, N. Y.*
HORACE E. DEMING,
145 *W. 58th St., N. Y. City.*

EXHIBIT "B."

Third Paragraph of Will of David Dows, Jr.

"Whereas, by the sixth and eighth paragraphs of the will of my father, the late David Dows (which will was admitted to probate on the 14th day of April, 1890, by the surrogate of the city and
19 county of New York in the State of New York) I am given power to designate and appoint by will from among my children and their issue the person or persons in whom certain property or the proceeds of certain property mentioned and described in said sixth and eighth paragraphs of my father's will shall vest at my death now in pursuance and exercise of such power and powers I do hereby appoint, designate and direct as follows:

The said property subject to my appointment and the whole thereof shall vest upon my death in my three (3) children, David, Robert and Kenneth in the following manner, viz.:

(*a*) My son David shall have the use and income of three undivided forty-eighth parts thereof during the life of my son Robert and at the death of Robert or on Robert's reaching twenty-one years of age (whichever event shall sooner happen) the principal of such three-forty-eighth parts shall go in fee-simple and absolute ownership to my son Robert.

(*b*) My son David shall have the use and income of four other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching twenty-five years of age (whichever event shall sooner happen) the principal of such four-forty-eighth parts shall go in fee-simple and absolute ownership to my son Robert.

(*c*) My son David shall have the use and income of nine other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching thirty years of age (whichever event shall sooner happen) the principal of such nine-forty-eighth parts shall go in fee-simple and absolute ownership to my son Robert.

(*d*) My son Robert shall have the use and income of three
20 undivided forty-eighth parts thereof during his own life; and at his death or on his reaching twenty-one years of age (whichever event shall sooner happen) the principal of such three-forty-eighth parts shall go in fee-simple and absolute ownership to my son Kenneth.

(*e*) My son Robert shall have the use and income of four other undivided forty-eighth parts thereof during his own life; and at his death or on his reaching twenty-five years of age (whichever event shall sooner happen) the principal of such four-forty-eighth parts thereof shall go in fee-simple and absolute ownership to my son Kenneth.

(*f*) My son Robert shall have the use and income of nine other undivided forty-eighth parts thereof during his own life; and at his death or on his reaching thirty years of age (whichever event shall sooner happen) the principal of such nine-forty-eighth parts shall go in fee-simple and absolute ownership to my son Kenneth.

(*g*) My son Kenneth shall have the use and income of three undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching twenty-one years of age (whichever event shall sooner happen) the principal of such three-forty-eighth parts shall go in fee-simple and absolute ownership to my son David.

(*h*) My son Kenneth shall have the use and income of four other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching twenty-five years of age (whichever event shall sooner happen) the principal of such four-forty-eighth parts shall go in fee-simple and absolute ownership to my son David.

(*i*) My son Kenneth shall have the use and income of nine
21 other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching thirty years of age (whichever event shall sooner happen)

the principal of such nine-forty-eighth parts shall go in fee-simple and absolute ownership to my son David.

If my son Robert shall not be living at my death, then the life measuring the duration of the respective estates *pur autre vie* shall be that of my son Kenneth, and in such case the respective life estates in the three-forty-eighths, four-forty-eighths and the nine-forty-eighths shall terminate, and the respective remainders take effect upon Kenneth's death; or as to the three-forty-eighths, upon his reaching the age of twenty-three; and as to the four-forty-eighths, upon his reaching the age of twenty-seven, and as to the nine-forty-eighths, upon his reaching the age of thirty-two; instead of upon Robert's reaching twenty-one, twenty-five and thirty, respectively.

It is my meaning that each of my said three sons shall take an estate *pur autre vie* in one equal share of all the property over which my said father's will gives me the power of appointment, such life estate to be measured by the life of my son Robert, or if he is dead, by that of my son Kenneth, with the possibility of such life estate being shortened, as to certain specified portions thereof, by Robert's or Kenneth's (as the case may be) reaching certain specified ages; and that each shall take also a remainder in another equal share, to take effect in possession at the close of his life estate in the other share; but that each interest for life or remainder shall vest absolutely and at once upon my death, in legal and not equitable ownership, and without contingency.

If any of my said three children shall have died prior to my death leaving issue who shall be living at my death, such issue shall take, share and share alike, the portion and interests,
22 which, under this provision, would have gone to the parent if living.

If any one of my said three children shall have died prior to my death, without leaving issue who shall be living at my death, the portion and interests which such child would have taken under this provision, if living, shall go share and share alike to the survivors among such three children living at my death."

Order Appointing Appraiser.

At a surrogate's court, held in and for the county of New York, at the county court-house in the city of New York, on the 31st day of October, 1900.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

On reading and filing the petition of Bird S. Coler, comptroller of the city of New York, and Theodore P. Gilman, comptroller of the State of New York, verified October 31, 1900, I do hereby, pursuant to the requirement of chapter 658 of the Laws of 1900, direct Charles K. Lexow, Esq., one of the appraisers appointed by the

State comptroller under said statute, to fix the fair market value at the time of the transfer of the property which was of the above-named decedent and which is subject to the payment of any tax imposed by article X, chapter 908, Laws of 1896, and the acts amendatory thereof and supplemental thereto.

ABNER C. THOMAS, *Surrogate.*

23 *Report of Appraiser.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of DAVID DOWS, SENIOR, Deceased.

To the surrogate's court of the county of New York:

I, Charles K. Lexow, who was, by an order of Hon. Abner C. Thomas, one of the surrogates of the county of New York, made and entered on the 31st day of October, 1900, directed to act as appraiser, in pursuance of chaper 908 of the Laws of 1896, and the acts amendatory thereof and supplemental thereto, do respectfully report:

First. That forthwith after my said appointment, I duly took and subscribed the oath prescribed by statute, which said oath is hereunto annexed.

Second. That thereafter, on the 1st day of November, 1900, I duly gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property of said David Dows, Senior, deceased, subject to the payment of the tax imposed by said law, including those named by the surrogate in the said order, of the time and place at which I would appraise the property of said David Dows, Senior, deceased, subject to the payment of said tax;

24 a true copy of said notice, together with proof of mailing thereof, is also hereto attached:

Comptroller of the State of New York;
Comptroller of the city of New York;
Alexander E. Orr;
William A. Nash;
George B. Cooksey;
Richard M. Hoe;
Tracy Dows;
David Dows, 3rd;
Robert Dows;
Kenneth Dows.

Third. I further report that at the time and place in said notice stated, to wit: on the 8th day of November, 1900, at one o'clock in the afternoon, at room No. 1403, in the Home Life building, Nos. 256 and 257 Broadway, in the borough of Manhattan, city of New York, and at other and subsequent times and at divers places, I appraised all the property, being wholly personal, of said David Dows, Senior, deceased, subject to the payment of the said tax, at its fair market value at the date of the death of said David Dows, Jr., de-

ceased, to wit: on or about the 13th day of January, 1899, as follows:

Value of property in statement "A"	$1,677,356.73
Value of property in statement "B"	827,751.19
Total	$2,505,107.92

That the value of $\frac{3}{8}$ths is	$156,569.24
That the value of $\frac{4}{8}$ths is	208,758.99
That the value of $\frac{9}{8}$ths is	469,707.74

25 Fourth. I further report that statement "A," attached hereto and made a part hereof, contains an accurate and complete schedule of all the property held by the trustees of said David Dows, Senior, on said 13th day of January, 1899, under the sixth paragraph of said will of David Dows, Senior, together with its fair market value on said date.

Statement "B," hereto attached and made a part hereof, contains an accurate and complete schedule of all the property of said David Dows, Senior, mentioned and referred to in the eighth paragraph of the will of David Dows, Senior, held by the trustees of the said David Dows, Senior, on said 13th day of January, 1899, under the eighth paragraph of said will of David Dows, Senior, except certain specific pieces of real estate held by said trustees together with its fair market value on said 13th day of January, 1899.

I further report that the value of one-eighth of said property on said 13th day of January, 1899, is the sum of $827,751.19.

Fifth. I further report that said David Dows, Senior, died on the 30th day of March, 1890, and his will was admitted to probate in the surrogate's court of New York county on the 14th day of April, 1890; a true copy of his will is annexed to the petition herein.

I further report that David Dows, Junior, died on the 13th day of January, 1899, and his will was admitted to probate in the surrogate's court of Westchester county on the 11th day of February, 1899; a true copy of the third paragraph of said will is annexed to the petition herein.

David Dows, Third, Robert Dows and Kenneth Dows were the only children of said David Dows, Junior, living at the death of their grandfather, said David Dows, Senior. No children were born to said David Dows, Jr., after the death of the said David
26 Dows, Senior, and said David Dows, 3d, Robert Dows and Kenneth Dows were living on January 13th, 1899, at the death of their father, David Dows, Jr.

Said David Dows, 3d, was born August 12th, 1885; said Robert Dows was born December 28th, 1886, and said Kenneth Dows was born September 7th, 1889.

The Dows and Columbia stores, mentioned in the sixth paragraph of said will of David Dows, Senior, a true copy of which will is annexed to the petition herein, *was*, at the time of his death, real estate, and *was* the only property passing under said sixth paragraph, and the interest of said David Dows, Senior, in certain real

estate known as the Fulton stores, which *was* included in the property passing under the eighth paragraph of said will, *were*, in or about the year 1895, sold to the Brooklyn Wharf & Warehouse Company, a corporation duly organized under the laws of the State of New York. The proceeds of the sales of said Dows and Columbia stores were invested in the property contained in statement "A," hereinbefore mentioned.

Said interest in said Fulton stores was sold for $450,187.50, which sum was invested in, and forms a part of, the property contained in statement "B," hereinbefore mentioned.

In addition to said Fulton stores, said David Dows, Senior, owned certain real estate known as the Brooklyn Avenue property, which was included in the property passing under the eighth paragraph of his said will. Said Brooklyn Avenue property was sold, in or about the year 1893, for $67,500.00, which sum was invested in, and forms a part of, the property contained in statement "B," hereinafter mentioned. Each of said statements, "A" and "B," contains the true and fair value on the 13th day of January, 1899, of the property scheduled therein.

27 Sixth. I further report that all the persons mentioned as parties hereto are of sound mind and full age, except David Dows, 3d, Robert Dows and Kenneth Dows, infants, who appear herein by Richard M. Hoe and Tracy Dows, their general guardians, appointed as such on the 8th day of April, 1899, by the surrogate of Westchester county, of the State of New York, by letters of guardianship duly issued to them on said date.

Seventh. I further report that the following appearances were made before me in this proceeding:

The Comptroller of the State of New York, and the Comptroller of the City of New York, by Joseph W. Middlebrook, Esq., their attorney;

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as trustees and executors of the last will and testament of David Dows, Jr., deceased;

Tracy Dows and Richard M. Hoe, as executors of the last will and testament of David Dows, Junior, deceased, Tracy Dows and Richard M. Hoe, as guardians of David Dows, 3d, Robert Dows and Kenneth Dows,

By Horace E. Deming, their attorney.

Eighth. I further report that there were filed with me the objections hereto annexed, and that I have overruled each of said objections (*post*, pp. 34–39).

Ninth. I further report that included in the property contained in said statement "B" are 50 State of New York canal-improvement bonds, due January 12th, 1912; interest, 3 per cent., par value, $50,000, market value, $51,635. Said bonds were issued on September 4th, 1897, pursuant to chapter 79 of the Laws of 1895. I have held that they are taxable in this proceeding.

Also included in said statement "B" are 100 consolidated stock of the city of New York, due 1922; interest 3½ per cent., par value

$100,000.00, market value $109,380.00. These bonds were
28 issued November 12th, 1896, for the redemption of bonds and stock of the city of New York, maturing in the year 1896. I have held that they are taxable in this proceeding; my ruling in each case being based upon the theory that the tax is a tax upon transfer and not upon property.

Tenth. I further report that no deductions have been made for debts, expenses or commissions, none having been claimed.

Eleventh. I further report that in compliance with the request of the surrogate hereto annexed, the insurance department of the State of New York has furnished its certificate of the values of the various estates, and of the remainders, which certificate is hereunto annexed and made a part of this report.

All the property mentioned in the sixth paragraph of the will of David Dows, Senior, and one-eighth of all the property mentioned in the eighth paragraph of said will, was given to trustees to pay the income thereof during the life of David Dows, Jr., and said David Dows, Jr., was given power to *appoint* said property by will among his children. He exercised the power as follows:

(*a.*)

His son David Dows, Third, is given the use and income of three undivided forty-eighth parts of said property during the life of Robert Dows (brother of said David Dows, Third) and at the death of Robert, or on Robert's reaching twenty-one years of age (whichever event should sooner happen), the principal of such three-forty-eighth parts is given in absolute ownership to Robert.

The value of the $\frac{3}{48}$ths I find to be..... $156,569.24
The value of the life interest I find to be... $52,624.00
The value of the remainder I find to be ... 89,923.00

29 (*b.*)

Similarly, David is given the use and income of four undivided forty-eighths of such property during the life of Robert; and at the death of Robert, or on Robert's reaching twenty-five years of age (whichever event should sooner happen), the principal of such four-forty-eighths is given, in absolute ownership, to Robert.

The value of the $\frac{4}{48}$ths I find to be..... $208,758.99
The value of the life interest I find to be... $90,706.00
The value of the remainder I find to be..... 93,201.00

(*c.*)

Similarly, said David is given the use and income of nine undivided forty-eighths of such property during the life of Robert; and at the death of Robert, or on Robert's reaching thirty years of age (whichever event should sooner happen), the principal of such nine-forty-eighths is given, in absolute ownership, to Robert.

The value of the $\frac{9}{48}$ths I find to be..... $469,707.74
The value of the life interest I find to be.. $247,435.00
The value of the remainder I find to be... 150,902.00

(*d.*)

Similarly, said Robert is to have the use and income of three undivided forty-eighths of such property during his own life, and at his death, or on his reaching twenty-one years of age (whichever event should sooner happen), the principal of such three-forty-eighths is given, in absolute ownership, to Kenneth Dows (brother of
30 David Dows, Third).

The value of the $\frac{3}{48}$ths I find to be..... $156,569.24
The value of the life interest I find to be... $54,142.00
The value of the remainder I find to be..... 95,347.00

(*e.*)

Similarly, said Robert is to have the use and income of four undivided forty-eighths of such property during his own life, and at his death, or on his reaching twenty-five years of age (whichever event should sooner happen), the principal of such four-forty-eighths is given, in absolute ownership, to said Kenneth.

The value of the $\frac{4}{48}$ths I find to be..... $208,758.99
The value of the life interest I find to be... 94,352.00
The value of the remainder I find to be..... 101,670.00

(*f.*)

Similarly, said Robert is to have the use and income of nine undivided forty-eighths of such property during his own life, and at his death, or on his reaching thirty years of age (whichever event should sooner happen), the principal of such nine-forty-eighths is given, in absolute ownership, to said Kenneth.

The value of the $\frac{9}{48}$ths I find to be..... $469,707.74
The value of the life interest I find to be.. $260,721.00
The value of the remainder I find to be... 172,059.00

(*g.*)

Similarly, said Kenneth is to have the use and income of three undivided forty-eighths of such property during the life of
31 said Robert; and at the death of Robert, or on Robert's reaching twenty-one years of age (whichever event should sooner happen), the principal of such three-forty-eighths is given, in absolute ownership, to said David.

The value of the $\frac{3}{48}$ths I find to be $156,569.24
The value of the life interest I find to be... $52,873.00
The value of the remainder I find to be ... 90,704.00

(*h.*)

Similarly, the said Kenneth is to have the use and income of four undivided forty-eighths of such property during the life of said Robert; and at the death of Robert, or on Robert's reaching twenty-five

years of age (whichever event should sooner happen), the principal of such four-forty-eighths is given, in absolute ownership, to said David.

The value of the $\frac{4}{48}$ths I find to be	$208,758.99
The value of the life interest I find to be.. $91,220.00	
The value of the remainder I find to be ... 94,054.00	

(*i.*)

Similarly, the said Kenneth is to have the use and income of nine undivided forty-eighths of such property during the life of said Robert; and at the death of Robert, or on Robert's reaching thirty years of age (whichever event should sooner happen), the principal of such nine-forty-eighths is given, in absolute ownership, to said David.

The value of the $\frac{9}{48}$ths I find to be	$469,707.74
The value of the life interest I find to be. $249,128.00	
The value of the remainder I find to be.. 153,505.00	

32 Twelfth. I therefore appraise the values of the legacies to said David Dows, Third; Robert Dows, and Kenneth Dows, who are each grandchildren of David Dows, Senior (the donor of the power of appointment), and children of David Dows, Junior (the donee of the power of appointment), as determined by the eleventh paragraph of this report, as follows:

David Dows, Third:

Value of life estate, sub. (*a*).....	$52,624.00	
Value of life estate, sub. (*b*).....	90,706.00	
Value of life estate, sub. (*c*).....	247,435.00	
		$390,765.00
Value of remainder, sub. (*g*).....	90,704.00	
Value of remainder, sub. (*h*).....	94,054.00	
Value of remainder, sub. (*i*).....	153,505.00	
		338,263.00
		$729,028.00

Robert Dows:

Value of life estate, sub. (*d*).....	$54,142.00	
Value of life estate, sub. (*e*).....	94,352.00	
Value of life estate, sub. (*f*).....	260,721.00	
		$409,215.00
33 Value of remainder, sub. (*a*).....	89,923.00	
Value of remainder, sub. (*b*).....	93,201.00	
Value of remainder, sub. (*c*).....	150,902.00	
		334,026.00
		$743,241.00

Kenneth Dows:

Value of life estate, sub. (*g*)	$52,873.00	
Value of life estate, sub. (*h*)	91,220.00	
Value of life estate, sub. (*i*)	249,128.00	
		393,221.00
Value of remainder, sub. (*d*)	95,347.00	
Value of remainder, sub. (*e*)	101,670.00	
Value of remainder, sub. (*f*)	172,059.00	
		369,076.00
		$762,297.00

All of which is respectfully submitted.
Dated New York, January 31, 1901.

CHARLES K. LEXOW, *Appraiser.*

34 *Objections Filed with Appraiser.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E. Deming, Esq., their attorney, present the following objections to the proceedings herein and the appraisal thereunder:

I.

The alleged basis for this proceeding is subdivision 5 of section 220 of article X (entitled taxable transfers) of the tax law of the State of New York (chapter 908, Laws 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when
35 made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby be-

coming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision 5 of section 220 as amended is unconstitutional, null and void under section 1 of the fourteenth amendment to the Constitution of the United States in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death in 1890, David Dows, Sr. had the undoubted legal right to transfer by will, his property or any interest therein to his grandchildren, David Dows, 3d, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death in 1890, his said grandchildren acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks, in 1899, to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows'
36 grandchildren a portion of the very property, the full right to which had vested in them many years before.

It is, therefore, unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

4. This amendment imposes an unequal, arbitrary and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground but is a mere arbitrary selection.

5. This amendment attempts by arbitrary definition to change the character of a thing by merely changing its name and by pronouncing a transfer what is not a transfer to take away the vested property rights of citizens.

II.

Even if subdivision 5 of section 220 of the transfer tax law be declared valid the various remainders vesting in David Dows, 3d, Robert Dows and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property.

37 Any construction of the transfer tax act which makes such remainders now taxable is in conflict with section 1 of the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law, and denies to such citizens the equal protection of the laws.

III.

Under article X of the tax law of the State of New York the transfer of real estate to lineal descendants is exempt from taxation; and the question whether property is real estate or personalty is determined by its form at the death of the persons from whom the property comes. In the present case David Dows, Sr., is that person. At his death in 1890 the Dows and Columbia stores, comprising the entire property held by the trustees under the sixth paragraph of the will of David Dows, Sr., and the Fulton stores and the Brooklyn Avenue property contained in the property held by the trustees under the eighth paragraph of said will were real estate. The said Dows and Columbia stores were sold in or about the year 1895 and the proceeds thereafter invested in the various securities which the trustees under said sixth paragraph held on the 13th day of January, 1899, in place of said real estate and which appear in statement A attached to the affidavit of Richard M. Hoe and Tracy Dows (verified the 30th day of November, 1900).

The said Fulton stores were sold in or about the year 1895 for $450,187.50 and the said Brooklyn Avenue property was sold in or about the year 1893 for $67,500.

Both of said sums were invested in securities which the trustees under the said eighth paragraph held on the said 13th day of January, 1899, in place of said real estate and are included in
38 statement B attached to said affidavit of Richard M. Hoe and Tracy Dows. The property scheduled in said statement A and $517,687.50 of the property included in said statement B are, therefore, not taxable in this proceeding.

IV.

The tax under said subdivision five of section 220 of the tax law is a tax upon property.

1. Under subdivision 16 of section 4 of said tax law all the stocks in the list hereto annexed marked "A" (fol. 118–122), the same being stocks in incorporated companies liable to taxation on their capital, are exempt from taxation.

2. Under chapter 80 of Laws of 1897, amending subdivision 6 of section 4 of the tax law, the following property scheduled in statement B attached to the affidavit of Richard M. Hoe and Tracy Dows, verified November 30th, 1900, is exempt from taxation:

50 State of New York Canal improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value,

$51,635, issued September 4th, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896.

Said last-mentioned property is also exempt from taxation under the provisions of section 7, the municipal corporations law (chap. 685 of the Laws of 1892).

3. The following property, scheduled in statement B, attached to the affidavit of Richard M. Hoe and Tracy Dows, verified Novem- 30th, 1900:

39 50 State of New York Canal improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635. Issued September 4, 1897, pursuant to chapter 79 of the Laws of 1895;

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York, maturing in the year 1896,

is not taxable in this proceeding. Section 10 of article 1 of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

Dated New York, November 8, 1900.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al.

40 "A."

List of Stocks Referred to in Objection IV, the Same Being Stocks in Incorporated Companies Liable to Taxation on Their Capital.

No. shares.	Company.	Par value.	Appr's'd val.
200	Chicago and Northwestern preferred stock....	20,000	37,400.00
3,064	Delaware and Hudson Canal Co. stock.....	306,400	341,636.00
2,527	Chicago, Rock Island and Pacific stock.....	252,700	289,973.25
400	Missouri Pacific stock.....	40,000	18,250.00
1,000	Chicago, St. Paul, Minneapolis and Omaha preferred stock.....	100,000	167,000.00
500	Canada Southern stock..	50,000	27,500.00
700	Union Pacific preferred stock.....	70,000	51,800.00
1,000	Union Pacific common stock.....	100,000	45,125.00
1,543	Chicago and Eastern Illinois preferred stock	154,300	175,902.00
240	Rome, Watertown and Ogdensburg stock.....	24,000	30,720.00
218	New York, New Haven and Hartford stock...	21,800	43,436.50
50	Merchants' National (of New York) Bank stock.....	2,500	3,850.00
300	Ontario Silver Mining Co. stock.....	30,000	1,800.00
1,343	Kingston and Pembroke Iron Mining Co. stock.	33,575	53.72
400	Federal Steel preferred stock	40,000	33,200.00
150	Peoria and Bureau Valley Railroad stock.....	15,000	27,300.00
70	Rock Island and Peoria stock.....	7,000	7,000.00
186	Central Ohio stock.....	9,300	3,999.00
8	New York and South Brooklyn Ferry and Steam Navigation Co. stock.....	800	208.00
434	Big Muddy Coal and Iron Co. preferred stock.	43,400	1,085.00
322	Central Park, North and East River stock....	32,200	57,960 00
400	Erie and Pittsburgh stock.....	20,000	27,600.00
1,000	Pittsburgh, McKeesport and Youghiogheny stock.....	50,000	68,500 00
500	Union National (of Chicago) Bank stock.....	50,000	60,000.00
41			
100	Central Trust Company stock....	10,000	180,000.00
300	Standard Oil Trust certificates	30,000	134,250.00
12	Consolidated Elevator Co., Duluth, first preferred stock.....	1,200	1,200.00
12	Consolidated Elevator Co., Duluth, second preferred stock.....	1,200	1,080.00
24	Consolidated Elevator Co., Duluth, common stock.....	2,400	600.00
46	Natural Gas Trust certificates.....	4,600	9,200.00
1	Clinton Hall Association certificate.....	50	25.00
50	Improved Dwelling Association stock	5,000	4,750.00

42 *Order Assessing Tax.*

At a surrogate's court, held in and for the county of New York, at the county court-house in the city of New York, on the 15th day of February, 1901.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

On reading the report of Charles K. Lexow, Esq., the appraiser, filed herein on the 8th day of February, 1901, and on motion of Joseph W. Middlebrook, attorney for the petitioners herein, it

Ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act relating to taxable transfers, and the tax to which the said transfers are liable, is as follows:

Beneficiary.	Cash value of interest.	Tax assessed thereon.	
David Dows, 3d	$52,624.00	$526.24	
" "	90,706.00	907.06	
" "	247,435.00	2,474.35	
" "	90,704.00	907.04	
" "	94,054.00	940.54	
" "	153,505.00	1,535.05	
			$7,290.28
43			
Robert Dows	54,142.00	541.42	
" "	94,352.00	943.52	
" "	260,721.00	2,607.21	
" "	89,923.00	899.23	
" "	93,201.00	932.01	
" "	150,902.00	1,509.02	
			$7,432.41
Kenneth Dows	52,873.00	528.73	
" "	91,220.00	912.20	
" "	249,128.00	2,491.28	
" "	95,347.00	953.47	
" "	101,670.00	1,016.70	
" "	172,059.00	1,720.59	
			$7,622.97

ABNER C. THOMAS, *Surrogate.*

44 *Notice of Appeal to Surrogate.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

Please take notice that Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E. Deming, Esq., their attorney, appeal to the surrogate of New York county from the report of the appraiser herein filed on the 8th day of February, 1901, and from the order entered herein on the 15th day of February, 1901, and from each and every part of said order, and hereby state the following as the grounds of their appeal:

I.

The alleged basis for this proceeding is subdivision 5 of section 220 of article X (entitled taxable transfers) of the tax law of the State of New York (chapter 908, Laws 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

45 "5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provision of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision 5 of section 220 as amended is unconstitutional, null and void under section 1 of the fourteenth amendment to the Constitution of the United States in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death in 1890, David Dows,

Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren David Dows, 3rd, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his
46 death in 1890, his said grandchildren acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks, in 1899, to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property, the full right to which had vested in them many years before.

It is, therefore, unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

4. This amendment imposes an unequal, arbitrary and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground but is a mere arbitrary selection.

5. This amendment attempts by arbitrary definition to change the character of a thing by merely changing its name and by pronouncing a transfer what is not a transfer to take away the vested property rights of citizens.

II.

Even if subdivision 5 of section 220 of the transfer tax law
47 be declared valid, the various remainders vesting in David Dows, 3rd, Robert Dows and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property.

Any construction of the transfer tax act which makes such remainders now taxable is in conflict with section I of the fourteenth amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law and denies to such citizens the equal protection of the laws.

III.

Under article X of the tax law of the State of New York the transfer of real estate to lineal descendants is exempt from taxation; and the question whether property is real estate or personalty, is determined by its form at the death of the person from whom the

property comes. In the present case David Dows, Sr., is that person. At his death in 1890 the Dows and Columbia stores comprising the entire property held by the trustees under the sixth paragraph of the will of David Dows, Sr., and the Fulton stores and Brooklyn Avenue property contained in the property held by the trustees under the eighth paragraph of said will were real estate. The said Dows and Columbia stores were sold in or about the year 1895 and the proceeds thereafter invested in the various securities which the trustees under said sixth paragraph held on the 13th day of January, 1899, in place of said real estate and which appear in statement A annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows (verified the 30th day of November, 1900).

The said Fulton stores were sold in or about the year 1895 for $450,187.50 and the said Brooklyn Avenue property was sold in or about the year 1893 for $67,500.

48 Both of said sums were invested in securities which the trustees under the said eighth paragraph held on the said 13th day of January, 1899, in place of said real estate, and are included in statement B annexed to the report of the appraiser herein and attached to said affidavit of Richard M. Hoe and Tracy Dows. The property scheduled in said statement A and $517,687.50 of the property included in said statement B are, therefore, not taxable in this proceeding.

IV.

The tax under said subdivision 5 of section 220 of the tax law is a tax upon property.

1. Under subdivision 16 of section 4 of said tax law all the stocks marked with an asterisk in the last column of statements A and B annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows, verified the 30th day of November, 1900 (*ante*, fols. 118–122) the same being stocks in incorporated companies liable to taxation on their capital, are exempt from taxation.

2. Under chapter 80 of Laws of 1897 amending subdivision 6 of section 4 of the tax law the following property scheduled in statement B annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows, verified November 30th, 1900, is exempt from taxation.

50 State of New York canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635, issued September 4th, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896.

49 Said last-mentioned property is also exempt from taxation under the provisions of section 7, the municipal corporation law (chap. 685 of the Laws of 1892).

3. The following property scheduled in statement B annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows, verified November 30th, 1900:

50 State of New York, canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635.

Issued September 4, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896,

is not taxable in this proceeding. Section 10 of article 1 of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

Upon this proceeding it is intended to draw in question the validity of all the provisions of said statute which purport to enforce a tax upon the whole or any part of the property herein, and it is intended to draw into question the authority and jurisdiction exercised thereunder by the surrogate and the appraiser upon the grounds that such provisions are repugnant to the Constitution of the United States as hereinabove set forth. The appellants specially set up and claim a title, right, privilege and immunity under section 1 of the fourteenth article of amendment of the Constitution of the United States and section 10 of article 1 of said Constitu-
50 tion, as aforesaid, which title, right, privilege and immunity is violated and destroyed by the provisions of said statute.

Dated, New York, February 19, 1901.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al., Appellants,
11–13 *William Street, Borough of Manhattan,*
City of New York.

To the surrogate of New York county, the clerk of the surrogate's court, New York county; Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the city of New York.

51 *Order of Surrogate from which Appeal is Taken.*

At chambers of the surrogate's court held in and for the county of New York, at the county court-house in the county of New York, on the 6th day of March, 1901.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last

will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, having appealed from the report of the appraiser herein filed on the 8th day of February, 1901, and from the order confirming said report and fixing and assessing the transfer tax herein entered and filed on the 15th day of February, 1901, and said appeal having come on to be heard—

Now, after hearing Horace E. Deming, Esq., attorney for appellants, in support of said appeal and Joseph W. Middlebrook, Esq., attorney for respondents, in opposition thereto, it is—

Ordered, adjudged and decreed, that said report and order
52 so appealed from be and they hereby are affirmed and that the date when the transfers now taxed were effected was January 13, 1899, that date being fixed because it was the date of the death of David Dows, Jr., the donee of the power contained in the will of David Dows, Sr.

ABNER C. THOMAS, *Surrogate.*

Notice of Appeal to Appellate Division (Executors).

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Please take notice that Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., appearing by Horace E. Deming, Esq., their attorney, appeal to the appellate division, first department, of the supreme court of the State of New York, from the order of affirmance of the surrogate made and entered herein on the 6th day of March, 1901, and from each and every part of said order; and the appellants hereby give notice that they intend to bring up for review on such appeal the order of the surrogate herein dated
53 the 15th day of February, 1901, fixing and assessing the tax, and each and every part of said order.

Dated New York, March 12th, 1901.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al., Appellants,
11–'3 *William Street, Borough of Manhattan,*
City of New York.

To Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the City of New York; J. Fairfax McLaughlin, Esq., clerk of the surrogate's court.

54 *Notice of Appeal to Appellate Division (Guardians).*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Please take notice that Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, and Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E Deming, Esq., their attorney, appeal to the appellate division, first department, of the supreme court of the State of New York, from the order of affirmance of the surrogate made and entered herein on the 6th day of March, 1901, and from each and every part of said order; and the appellants hereby give notice that they intend to bring up for review on such appeal the order of the surrogate herein, dated the 15th day of February, 1901, fixing and assessing the tax, and each and every part of said order.

Dated New York, March 12th, 1901.

HORACE E. DEMING,
Attorney for Richard M. Hoe and Tracy Dows, Appellants, 11–3 *William Street, Borough of Manhattan, City of New York.*

To Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the City of New York; J. Fairfax McLaughlin, Esq., clerk of the surrogate's court.

55 *Affidavit of No Opinion.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

STATE OF NEW YORK, *County of New York,* } ss.:

Horace E. Deming, being duly sworn, says:

I am the attorney for the appellants and am familiar with all the proceedings that have been had herein.

No opinion was given or filed by the surrogate.

HORACE E. DEMING.

Sworn to before me this 12th day of March, 1901.

JULIUS HENRY COHEN,
Notary Public # 53, *N. Y. Co.*

56 *Certification.*

STATE OF NEW YORK, } ss:
County of New York, }

I, J. Fairfax McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that I have compared the foregoing copy of the notices of appeal, papers, order and decree in the matter of the transfer tax upon the estate of David Dows, Sr., deceased, with the originals, in this office, and have found the same to be true and correct copies of such originals, and the originals thereof are all the papers upon which said order and decree was made.

In testimony whereof, I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York this 12th day of March, in the year of our Lord one thousand nine hundred and one.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

57 *Order of Affirmance by Appellate Division.*

At a stated term of the appellate division of the supreme court in the State of New York, in the first department, held at the court-house, in the county of New York, on the 22d day of March, 1901.

Present: Hon Charles H. Van Brunt, P. J.;
" William Rumsey,
" Edward Patterson,
" Chester B. McLaughlin, JJ.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, having respectively duly appealed to the appellate division of the supreme court of the State of New York, in the first department, from the order made in the above-entitled proceeding by the surrogate of
58 the county of New York dated and filed herein the 6th day of March, 1901, which order affirmed an order of the surrogate made and entered on the 15th day of February, 1901, confirming the report of the tax appraiser and assessing the tax herein, and said appeal having regularly come on to be heard,

Now after hearing Horace E. Deming, Esq., of counsel for the appellants, and Jabish Holmes, Jr., Esq., of counsel for the Comp-

troller of the City of New York, respondent, it is on motion of Joseph W. Middlebrook, Esq., attorney for respondent,

Ordered, adjudged and decreed that said order of the surrogate appealed from be, and the same hereby is affirmed, with costs to the respondent against the appellants.

59 Appellate Division of the Supreme Court, State of New York, First Judicial Department.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

CLERK'S OFFICE, NEW YORK COUNTY.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court, in the first judicial department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding, and entered in my office on the 28th day of March, 1901, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of New York, this 28th day of March, 1901.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

60 *Notice of Appeal to Court of Appeals.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, JR., Deceased.

Please take notice that Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E. Deming, Esq., their attorney, each respectively appeals to the court of appeals from the order entered in this proceeding in the office of the clerk of the appellate division, first department, on the 28th day of March, 1901, a certified copy of which said order was entered and filed in the office of the clerk of the surrogate's court of the county of New York on the 29th day of March, 1901, by which was affirmed the order of the surrogate of said county of New York, filed and entered herein on the 6th day of March, 1901, by which was affirmed the report of the appraiser herein filed on the 8th day of February, 1901, and the order
61 of the surrogate entered thereon, fixing and assessing the tax, entered in said office of the clerk of said surrogate's court on

the 15th day of February, 1901, and said appellants appeal from each and every part of said order, and hereby state the following as the grounds of their appeal:

I.

The alleged basis for this proceeding is subdivision 5 of section 220 of article X (entitled taxable transfers) of the tax law of the State of New York (chapter 908, Laws 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision 5 of section 220 as amended is unconstitutional, null and void under section 1 of the fourteenth amendment
62 to the Constitution of the United States in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death in 1890, David Dows, Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren, David Dows, 3d, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death in 1890 his said grandchildren acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks, in 1899, to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property, the full right to which had vested in them many years before.

It is, therefore, unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be a power

of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

63 4. This amendment imposes an unequal, arbitrary and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground but is a mere arbitrary selection.

5. This amendment attempts by arbitrary definition to change the character of a thing by merely changing its name and by pronouncing that a transfer which is not a transfer to take away the vested property rights of citizens.

II.

Even if subdivision 5 of section 220 of the transfer tax law be declared valid, the various remainders vesting in David Dows, 3d, Robert Dows and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property.

Any construction of the transfer tax act which makes such remainders now taxable is in conflict with section I of the fourteenth amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law and denies to such citizens the equal protection of the laws.

III.

Under article X of the tax law of the State of New York the transfer of real estate to lineal descendants is exempt from taxation; and the question whether property is real estate or personalty is determined by its form at the death of the person from whom the property comes. In the present case David Dows, Sr., is that person. At his death in 1890 the Dows and Columbia stores comprising the entire property held by the trustees under the sixth paragraph of

64 the will of David Dows, Sr., and the Fulton stores and Brooklyn Avenue property contained in the property held by the trustees under the eighth paragraph of said will were real estate. The said Dows and Columbia stores were sold in or about the year 1895 and the proceeds thereafter invested in the various securities which the trustees under said sixth paragraph held on the 13th day of January, 1899, in place of said real estate and which were included by the appraiser in his report (fols. 77, 73).

The said Fulton stores were sold in or about the year 1895 for $450,187.50, and the said Brooklyn Avenue property was sold in or about the year 1893 for $67,500 (fols. 77–'8).

Both of said sums were invested in securities which the trustees under the said eighth paragraph held on the said 13th day of January, 1899, in place of said real estate, and are included in the report of the appraiser herein. The property so reported as property

held under said eighth paragraph and $517,687.50 of the property so reported as property held under said sixth paragraph are, therefore, not taxable in this proceeding.

IV.

The tax under said subdivision 5 of section 220 of the tax law is a tax upon property.

1. Under subdivision 16 of section 4 of said tax law all the stocks set forth in the appeal papers at fols. 118–122, the same being stocks in incorporated companies liable to taxation on their capital, are exempt from taxation.

2. Under chapter 80 of Laws of 1897 amending subdivision 6 of section 4 of the tax law the following property included in the report of the appraiser herein (fols. 81–'2) is exempt from taxation:

65 50 State of New York canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635. Issued September 4th, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value. $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896.

Said last-mentioned property is also exempt from taxation under the provisions of section 7, the municipal corporation law (chap 685 of the Laws of 1892).

3. The following property included in the report of the appraiser herein:

50 State of New York canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635.

Issued September 4, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896,

is not taxable in this proceeding. Section 10 of article 1 of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

Upon this appeal it is intended to draw in question the validity of all the provisions of said statute which purport to enforce a tax upon the whole or any part of the property herein, and it is
66 intended to draw into question the authority and jurisdiction exercised thereunder by the surrogate and the appraiser upon the grounds that such provisions are repugnant to the Constitution of the United States as hereinabove set forth. The appellants specially set up and claim a title, right, privilege and immu-

nity under section 1 of the fourteenth article of amendment of the Constitution of the United States and section 10 of article 1 of said Constitution, as aforesaid, which title, right, privilege and immunity is violated and destroyed by the provisions of said statute.

And they hereby give notice that they intend to bring up for review on such appeal the order of said surrogate herein dated the 15th day of February, 1901, fixing and assessing the tax and each and every part of said order.

Dated New York, March 29, 1901.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al., Appellants,
11–13 *William Street, Borough of Manhattan,*
City of New York.

To the clerk of the surrogate's court, New York county; Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the City of New York.

67 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, First Department.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

STATE OF NEW YORK, }
County of New York, } ss.:

Horace E. Deming, being duly sworn, says:

I am the attorney for the appellants and am familiar with all the proceedings that have been had herein.

No opinion was given or filed herein by the appellate division. The order of the surrogate was affirmed upon the opinion in the matter of Vanderbilt, 50 App. Div., 246; affirmed by the court of appeals on opinion of the appellate division in 163 N. Y., 597.

HORACE E. DEMING.

Sworn to before me this 2d day of April, 1901.

JULIUS HENRY COHEN,
Notary Public, # 53, *N. Y. Co.*

68 STATE OF NEW YORK, }
County of New York, } ss.:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the order of affirmance by the appellate division and the notice of appeal to the court of appeals, together with the notices of appeal to the appellate division, papers, order, and decree in the matter of the transfer tax upon the estate of David Dows, Sr., deceased, with the originals thereof in this office, and have found the same to be true and correct copies of such originals, and the same, with the

originals thereof, are all the papers upon which said order and decree was made.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of the surrogate's court of the county of New York this 2nd day of April, in the year of our Lord one thousand nine hundred and one.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

(10c. stamp cancelled.)

69 *Opinion of the Appellate Division in Matter of Vanderbilt*, 50 *App. Div.*, 246; *Affirmed by the Court of Appeals on the Opinion of the Appellate Division in* 163 *N. Y.*, 597.

Supreme Court, Appellate Division, First Department, March, 1900.

Charles H. Van Brunt, P. J.; Edward Patterson, Morgan J. O'Brien, George L. Ingraham, Chester B. McLaughlin, JJ.

In the Matter of the Appraisal of the Estate of WILLIAM H. VANDERBILT, Deceased. Apr. 10, 1900. No. 2052.

Appeal from order of the surrogate denying motion to have it adjudged that a certain trust fund was not liable to transfer tax.

Mr. Henry B. Anderson, for appellant; Mr. Jabish Holmes, Jr., for respondent.

PATTERSON, *J.*:

The single question arising on this appeal may be stated as follows: Is the right of succession to the trust fund created by the will of William H. Vanderbilt and as to which a power of appointment was given to the testator's son Cornelius Vanderbilt, subject to the imposition of a transfer tax under the provisions of chapter
70 284 of the Laws of 1897? The question arises upon the following facts:

William H. Vanderbilt died in 1885, and his will was admitted to probate in the month of December of that year. The trust fund involved in this proceeding was established in favor of his son Cornelius, who was to enjoy the income for life. The testator directed that upon the death of Cornelius the fund should be paid to his lawful issue in such shares or proportions as Cornelius might by his last will have directed or appointed, and in default of such appointment the gift is made directly to the issue with an alternative disposition on failure of such issue. Cornelius Vanderbilt died in 1899, leaving a last will and testament, which was duly admitted to probate, and in and by which he exercised the power given by the will of his father, by appointing a certain specified portion of the fund to one of his sons and directing that the balance be equally divided among his other children. At the time of the death of William H. Vanderbilt, this fund, or the right of succession to it, was

not taxable under the collateral inheritance tax law. The trustees of the fund held and administered it until the death of Cornelius Vanderbilt. In 1897, an amendment of subdivision 5 of section 220 of the tax law was passed, which provides, that whenever any person shall exercise a power of appointment derived from any disposition of property made either before or after the passage of the amendment, such appointment when made shall be deemed a transfer, taxable under the provisions of the act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will. In December, 1899, a trustee of the fund under the will of William H. Vanderbilt, presented a petition to the surrogate setting forth the creation of the trust fund (with other trusts of a
71 similar character for the benefit of other persons) and that through proceedings taken in 1887, to assess and determine the tax upon legacies made under the will of William H. Vanderbilt, it was in effect determined that the fund herein referred to was not subject to any transfer or inheritance tax. The petition sets forth the exercise of the power of appointment by Cornelius Vanderbilt and the names of his children, and that the comptroller of the city of New York claims that the fund or some portion of it may be subject to the payment of a tax by reason of the provisions of chapter 284 of the Laws of 1897, and he prays that it be adjudged by the surrogate that neither said fund nor any part thereof is liable to any such tax by reason of any of the said provisions or otherwise. This petition is in the nature of an application to the surrogate to determine the subject of taxation as applicable to this trust fund, and the matter was submitted in that aspect upon a stipulation as to agreed facts. The surrogate decided and decreed that the fund is subject to a transfer tax of one per cent. under and pursuant to chapter 284 of the Laws of 1897, and that proceedings to assess the same must be had accordingly, and further ordered and decreed that the motion to declare the fund exempt from taxation be in all respects denied.

On the argument of this appeal and in the briefs submitted by counsel, many subjects were discussed in an interesting and instructive manner, but the practical question presented for determination relates to the authority to impose a tax upon the succession to this trust fund, as that fund is at present situated. The provisions of the amendment of 1897, covers directly and in terms the present case. The fund, or the right of succession to the fund, has never, as matter of fact, been taxed, and we think the power to impose a tax was not exhausted by the proceedings in the surrogate's court for the
72 imposition of a tax directly connected with the general estate of William H. Vanderbilt. The real ground upon which the contention of the appellant is made here, is that the execution by Cornelius Vanderbilt of the power of appointment related back to the will of his father, which gave him that power, and that, therefore, everything connected with and every interest affected by the exercise of that power is to be regarded as coming under the ad-

ministration of William H. Vanderbilt's estate and must be controlled by the law in operation at the time of the probate of William H. Vanderbilt's will. Or to state the point as made by the learned counsel for the appellant, that every right of inheritance with respect to the fund passed and became complete before the passage of the amendment of 1897, and no right of inheritance came into existence by the exercise of the power in the will of Cornelius Vanderbilt, and there is nothing in respect to this fund for the amendment of 1897 to operate upon.

The rule respecting the relation back of the appointment to the original will giving the power to appoint has been applied in cases under the collateral inheritance tax law and under the transfer tax act. Matter of Harbeck (161 N. Y., 211). In that case, it appeared that a testator, whose will went into effect in 1878, long before the enactment of the transfer tax law, gave a power of appointment over a certain fund to his widow, which power was exercised by her in 1896. It was held that the source of the title of the appointees to the fund was the original will of Harbeck, and that the names of the appointees, although designated by a later instrument, must be read into the original will; from which it followed that there being no law in existence, at the time the original will was proven, imposing a tax on the succession to the fund, that right was
73 exempt from taxation. In that case, the court states three propositions as being settled: First, that the tax sought to be imposed is not a tax upon property but upon the right of succession. Second, that the transfer tax act (as it then stood), had no retroactive effect, and, third, that the beneficiaries whose succession is sought to be taxed took by virtue of the will of Harbeck. But in the same case it is stated that the question of the retroactive effect of the transfer tax law, in a case like this, has ceased to be of any special public importance, in consequence of the enactment of the amendment of 1897 of section 220 of the transfer tax law. While this may not be construed as a judicial declaration that the legislation embodied in the amendment is to be given full retroactive effect, it is a strong intimation in that direction.

Scrutinizing the text of the amendment of 1897, it appears that the direct object of that legislation was to make the time at which the appointees would become entitled in possession the time at which the tax upon the right of succession should be imposed. Furthermore, the act constituting the transfer is declared to be the exercise of the power of appointment. It is argued by the learned counsel for the appellant that this legislation is ineffective because it impairs contract obligations, interferes with vested rights of the children of Cornelius Vanderbilt and deprives them (to the extent of the tax) of property without due process of law.

As affecting contract obligations, the argument of the learned counsel proceeds upon the theory that when the will of William H. Vanderbilt was proved and a tax was paid under the law as it then existed upon the rights of inheritance under that will, no power remained in the State to impose any further tax upon anything which

passed under Mr. William H. Vanderbilt's will, or upon any
74 right of succession acquired by any one under that will.
The argument seems to be that when the collateral inheritance tax law of 1885 was passed it constituted a contract between the State of New York and William H. Vanderbilt that his estate, provided he should die while that law was in full operation and unchanged, might be disposed of by him without the imposition of any further or other tax upon any rights or interests acquired under that will. We cannot assent to that proposition. As was remarked by Judge Earle, in the case of The People *ex rel.* Gallatin Nat. Bank *v.* Comm'rs of Taxes, etc. (67 N. Y., 519), "It is never to be assumed that the State has by any act fettered its power of taxation in the future, unless it appears with irresistible clearness that the enactment was intended to be in the nature of a private contract as distinguished from a mere act of general legislation (People *v.* Roper, 35 N. Y., 629; People *v.* Comm'rs, etc., 47 N. Y., 501; Rector of Christ Church *v.* Philadelphia, 24 How., U. S., 300)." We do not find in the original act of 1885 anything which authorizes the legal conclusion that the provisions of that act are in their nature different from the ordinary features distinctively belonging to or connected with the power of the State over taxation. It cannot be inferred that the legislature was impotent to amend or modify the law. It was held in Carpenter *v.* Pennsylvania (17 How., U. S., 456), that where an estate was actually in the process of settlement, it was competent for the State to impose a tax upon property not taxable at the time of the probate of the will. The remarks of Mr. Justice Campbell in that case upon the subject are convincing. The exact situation of the fund in this case as affected by the question is the following: For purposes of general construction and the derivation of title to the fund as it now stands, the gift of the remainder comes under the will of William H. Vanderbilt. When he died,
75 the law as it then existed made no provision for the taxation of the ultimate right of succession to the fund. The legal title to it upon the probate of his will was in his executors until they accounted in the surrogate's court, constituted the fund out of the assets of the estate, and transferred it from themselves as executors to themselves as trustees, which we assume in this case was done. Then they held the fund still under the will but undistributed and finally undistributable until the power of appointment was exercised by Cornelius Vanderbilt. Meantime, and while they held it so undistributed in fact, the State in the exercise of its general power of taxation, found it expedient to tax the right to the succession, which right had not theretofore been taxed, making the transfer consist in that act by which each of the appointees became entitled to claim and to receive the particular or specific distributive share allotted to him. Of the general power of the State to fix the time at which the right of succession shall be taxed, and to define what shall be a transfer within the meaning of that act, we have no doubt, so long as that definition does not involve a violation of either contract or vested rights; and, as we have said, no contract relation was established by the act of 1885.

Although the execution of a power may for certain purposes relate back to the instrument conferring the power, there was no complete vesting of an estate in the children of Cornelius Vanderbilt, under the power, until that power was exercised. That seems to have been directly held in the matter of Stewart (131 N. Y., 274). The only distinction in the facts between that case and this is that in the Stewart case the power was unlimited and here it is confined to a class, but in both, the particular persons and the specific amounts they are to receive could not be ascertained for the purposes of taxation until after the exercise of the power.

76 Until that power was exercised, there was no method of determining the amount each of the appointees should receive or of a tax.

The rule applies equally to those cases where the power of appointment is unlimited, in which cases the appointees may be liable for an unequal amount of tax, because of their unequal degrees of consanguinity. In such cases the amount of the tax can only be determined after the execution of the power. It seems to be certain that the transfer of this property should be the subject of a tax as well as every other transfer, and the law cannot be applied with more certainty than by making the tax relate to the date of the determination of the estate, both as to the person who is to enjoy and the amount to be enjoyed. If the right of succession to this fund was taxable, as we think it was, the legislature had the power to declare that the tax should be imposed as of the time at which the right to possession of the amount appointed of the fund to each remainderman became fixed and determined by the exercise of the power of appointment. While the appointees take by relation back so as to derive their title under William H. Vanderbilt's will, they must take their specific shares in designated amounts from the time of the execution of the power. And, we think, that the authority of the State to impose a tax on the right of succession continued until the time at which the extent of that right was finally fixed by the exercise of the power of appointment.

If the views above expressed are correct, then it is quite apparent that the property has not been taken without due process of law, but only in the ordinary exercise of the right of the State to impose burdens upon the citizens by way of taxation.

The order appealed from should be affirmed with costs.

All concur.

77 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 17th day of May, in the year of our Lord one thousand nine hundred and one, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, May 17th, 1901.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Be it remembered that on the 3rd day of April, in the year of our Lord one thousand nine hundred and one, Alexander E. Orr & o'rs, as executors & trustees, &c.; Richard M. Hoe *et al.*, as executors & guardians, &c., and Robert Dows *et al.*, guardians, &c., the appellants in this proceeding, came here into the court of appeals, by Horace E. Deming, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the first judicial department, and Comptroller of the State of New York and Comptroller of the City of New York, the respondents in said proceeding, afterward appeared in said court of appeals by Joseph W. Middlebrook, their attorney.

78 Which said notice of appeal and the return thereto filed, as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this proceeding argued by Mr. Horace E. Deming, of counsel for the appellants, and by Mr. Jabish Holmes, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is, affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court of the county of New York, there to be proceeded upon according to law.

Therefore it is considered that the said order be, and the same hereby is, affirmed with costs.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the surrogate's court of New York county before the surrogate thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogate thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *May 17th*, 1901.

I hereby certify that the preceding record contains a [SEAL.] correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, *Clerk.*

79 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinion in the matter of the transfer tax upon the estate of David Dows, Senior, deceased, with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal, at the city of Albany, this twentieth day of May, A. D. 1901.

W. H. SHANKLAND, *Clerk.*

80 In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

Appeal from an order of the appellate division of the first department affirming an order of the surrogate of the county of New York imposing a transfer tax on a portion of the estate of David Dows, Senior.

Horace E. Deming and Julius Henry Cohen for appellants.
Jabish Holmes, Jr., and Joseph W. Middlebrook for respondents.

CULLEN, *J.:*

David Dows, Sr., died March 30th, 1880, leaving as a part of his estate a valuable piece of real property, which he devised to his trustees in trust to pay the income to his son, David Dows, Jr., during life, "and upon the death of my said son the said property, with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may by his last will and testament designate and appoint, and in such manner, and upon such terms as he may legally impose. But in case my said son, David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike, and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have received if living) to be paid to them at the times and in the proportion following, to wit." A similar devise was made of a share of the testator's residuary estate. The will gave the trustees a power of sale over the real property, which was exercised during the life of David Dows, Jr., and a large portion of the proceeds invested in the stocks of corporations. David Dows, Jr., died January 13th, 1899, leaving a last will and testament, by which he exercised the power of appointment given him by the will of his father in favor of his three
81 sons. By his will he gave to each of his sons the income of three undivided forty-eighths till his son Robert attained the

age of twenty-one years or sooner died, of four-forty-eighths until Robert attained twenty-five years or sooner died, and nine-forty-eighths until Robert attained thirty years or sooner died. Thus each son was given the income of sixteen-forty-eighths, or one-third of the property. At the termination of these life estates the principal was given to another son—that is to say, to B was given the principal of the share, the income of which A had been receiving; to C the principal of what had been B's share, and to A the principal of C's share. In result, each son receives one-third of the property absolute, for the will provides "that each interest for life or remainder shall vest absolute and at once upon my death, in legal and not equitable ownership, and without contingency," but each son, instead of being given the remainder in his own share after Robert arrives at the age of thirty years, is given the remainder in another son's share, though the shares are exactly equal. The learned surrogate imposed a tax on the property passing under this power of appointment both on the life estates and on the remainders. His order was affirmed by the appellate division and an appeal has been taken to this court.

The first objection raised to the order of the surrogate's court is that the tax imposed under the amendment of April 16th, '97 (chap. 284), to the taxable transfer act of 1896, upon transfers made under a power of appointment, is a tax on property and not on the right of succession, and that therefore so much of the fund as was invested in incorporated companies liable to taxation on their own capital and in certain bonds of the State of New York and bonds of the city of New York exempt from taxation by statute was not subject to the tax. On this question we are concluded by the previous decisions of this court (Matter of Vanderbilt, 163 N. Y., 597;
82 affirmed on opinion of Justice Patterson, below, in 50 App. Div., at p. 246; same case cited without opinion, 166 N. Y., 640), and little need be now said thereon. The theory on which taxation on the devolution of estates at the death of their owner is based and its validity upheld in cases where the State seeks to reach United States securities is clearly established, not only by our own decisions (*In re* Swift, 137 N. Y., 77; Matter of Sherman, 153 N. Y., 1), but by those of the Supreme Court of the United States (Magoun *v.* Illinois Trust Co., 170 U. S., 283; Plummer *v.* Coler, 178 U. S., 115; Murdock *v.* Ward, 178 U. S., 139). In Magoun *v.* Trust Company it is said of such taxes: "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation." The same doctrine was again asserted in Knowlton *v.* Moore (178 U. S., 41). It is insisted, however, that the title of the present owners is de-

duced from the will of David Dows, Sr., and not from that of his son, David Dows, Jr., and in support of this claim are cited the cases of Genet *v.* Hunt (113 N. Y., 158) and Matter of Harbeck (161 N. Y., 211). The proposition is doubtless true to a certain extent. For the purpose of determining whether the execution of the power is in contravention of the statute of perpetuities, the estate created under such power must be referred back to the instrument granting the power. This is settled law and was so
83 held in Genet *v.* Hunt (*supra*). Any other rule would permit the evasion of the statute against perpetuities by the grant of powers. The decision in matter of Harbeck (*supra*) proceeded on the ground that at the time of the exercise of the power of appointment in that case the legislature had not provided for the taxation of transfers under such powers. But, whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the right of the testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Sr., devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself—that is, for the privilege of succeeding to property under a will. Had the fund passed in default of an exercise of the power of appointment a very different proposition would be presented. We express no opinion on the subject whether, under such circumstances, the tax imposed by the amendment of '97 could be deemed other than a tax on the property itself.

The second objection urged against the order appealed from is that at the death of David Dows, Sr., the property was real estate on which there was at that time no transfer tax as
84 against lineal descendants of the testator. In matter of Sutton (3 App. Div., 208; affirmed by this court on opinion below, 149 N. Y., 618) the will directed an equitable conversion of the realty into personalty. It was held that the actual form in which the property existed at the time of the testator's death determined its liability to a transfer tax, and that, being real estate, it was exempt. The same rule governs the present case. At the time of the execution of the power of appointment under the will of David Dows, Sr., the property was personal. As we have held that it was the execution of that power which subjects grantees under it to the transfer tax, it follows that the condition or form of the property at the time of such execution must control.

The third objection is that the legatees or devisees of the remain-

ders are not subject to taxation until the precedent estates terminate and the remainders vest in possession. Practically each son of David Dows, Jr., is bequeathed one-third of the fund absolutely, with the time of enjoyment in possession postponed. What motive dictated the curious shifting of remainders found in the will of David Dows, Jr., we do not know, nor is it necessary that we speculate thereon. We shall treat these remainders as they are given in the will—that is, at the termination of a life estate in another party. Still, under the statute, it is plain that they are presently taxable. Subdivision 4, section 220, of the tax act (amended by chap. 284, Laws of '97) directs that the tax shall be imposed "when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act." Section 222 of the same law provides that all taxes shall be due and payable at the time of the transfer, except that "taxes upon the transfer of any estate, property, or interest therein limited, conditioned, de-
85 pendent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." Under a statute substantially the same in phraseology this court held, by Finch, J., in matter of Hoffman (143 N. Y., 327) that mere possibilities or chances of the acquisition of property, including not only contingent estates, but also estates technically vested, but liable to be divested, were not liable to taxation until the contingencies had passed or been fulfilled and the right to succeed to property become certain and absolute. This doctrine has no application to the remainders given to the sons of David Dows, Jr. They are absolute and not subject to be divested or to fail in any contingency whatever. By statute they are alienable, devisable, descendible, and if the property were real estate they could be sold on execution against their owners (Sheridan *v.* House, 4 Keyes, 569; Moore *v.* Littel, 41 N. Y., 66). By the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation. Therefore they do not fall within the exception of the statute and are subject to present taxation. Matter of Roosevelt (143 N. Y., 120) is not in conflict with this view. In that case it was held that certain vested remainders should not be taxed until the termination of the preceding life estate. The will then before the court bequeathed after the death of the life tenant seven life annuities contingent upon the survival of the life tenants by the annuitants, with cross-remainders among the annuitants themselves. These annuities, being contingent, were
86 not, under the rule declared by Judge Finch in the Hoffman case, taxable or their value ascertainable until they came into actual existence. The remainders given by the will were subject to these annuities. As the value of the annuities was not capable of ascertainment, the value of the remainders subject to those annuities

was necessarily equally incapable of computation. It was on this ground the decision proceeded. There is no such difficulty in the present case, and the decision of the Roosevelt case is therefore not in point.

The order appealed from should be affirmed with costs.

Parker, Ch. J.; O'Brien, Bartlett, Martin, Vann, and Landon, JJ., concur.

Order affirmed.

A copy.

E. A. BEDELL, *Reporter C.*

87 At a surrogate's court held in and for the county of New York, in the county court-house of said county, on the 28th day of May, 1901.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, having duly appealed to the court of appeals from the order of the appellate division of the supreme court of the State of New York, bearing date and entered on the 28th day of March, 1901, a certified copy of which said order was entered and filed in the office of the clerk of this court on the 29th day of March, 1901, by which was affirmed the order of the surrogate herein filed and entered on the 6th day of March, 1901, by which was affirmed the report of the appraiser herein filed on the 8th day of February, 1901, and the order of the surrogate entered thereon fixing and assessing the tax, entered herein on the 15th day of February, 1901, and said appeal
88 having been heard in the court of appeals, thereafter by its remittitur the court of appeals having ordered and adjudged that said order of the said appellate division affirming said order of this court, as aforesaid, should be affirmed with costs, and that the record of the proceedings in said court of appeals be remitted to this court, to be proceeded upon according to law:

Now, upon reading said remittitur and upon motion of Joseph W. Middlebrook, Esq., attorney for Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, it is

Ordered that said remittitur be placed on file in this court; and it is further

Ordered that the said remittitur and judgment of the court of ap-

peals be, and it hereby is, made the judgment and order of this court; and it is further

Ordered that the order of this court made and entered herein on the 6th day of March, 1901, be, and the same hereby is, in all respects affirmed, with costs to said Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, of said appeal to the court of appeals in the sum of $150.00, and his disbursements upon said appeal, amounting to the sum of $20.80, making in all the sum of $170.80.

ABNER C. THOMAS, *Surrogate.*

Approved as to form and costs.

HORACE E. DEMING,
Appellants' Attorney.

STATE OF NEW YORK, }
County of New York, } ss:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the order of affirmance by the appellate division and the notice of appeal to the court of appeals, together with the notices of appeal and decree in the matter of the transfer tax upon the estate of David Dows, Sr., deceased (also copy of opinion from the court of appeals and order of affirmance, remittitur from court of appeals and order on remittitur), with the originals thereof in this office, and have found the same to be true and correct copies of such originals, and the same, with the originals thereof, are all the papers upon which said order and decree was made.

New York Surrogate's Seal.

In testimony whereof I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York this 14th day of June, in the year of our Lord one thousand nine hundred and one.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

{ Ten-cent U. S. internal-revenue stamp, canceled June 14, '01. J. F. McL. }

89 [Endorsed:] Surrogate's court, New York county. In the matter of the transfer tax upon the estate of David Dows, Sr., deceased. Order on remittitur. Joseph W. Middlebrook, attorney for respondent, by Jabish Holmes, Jr., of counsel. (Surrogate's clerk's certificate within.)

90 To the Honorable Rufus W. Peckham, justice of the Supreme Court of the United States:

And now come Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of

David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, by Horace E. Deming, their attorney, and complain that in the record and proceedings and also in the rendition of an order or decree in the suit entitled "In the matter of the transfer tax upon the estate of David Dows, Sr., deceased," which is in the surrogate's court of the county of New York, in the State of New York, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to the said surrogate's court of the county of New York the record in the said suit, with an order affirming an order and decree theretofore rendered in the appellate division of the supreme court of the State of New York on the 28th day of March, 1901, affirming an order of said surrogate's court of the county of New York filed and entered therein on the 6th day of March, 1901, by which was affirmed the report of the appraiser therein filed on the 8th day of February, 1901, and the order of said court entered thereon on the 15th day of February, 1901; which said remittitur of the court of appeals directed that an order be entered in said surrogate's court of the county of New York in favor of the said Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, against
91 Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, upon which direction and order a decree of affirmance was entered in said surrogate's court of the county of New York on the 28th day of May, 1901, with costs, wherein was drawn in question the validity of all the provisions of a statute of the State of New York which purport to enforce a tax upon the whole or any part of the property appraised therein, and the authority and jurisdiction exercised thereunder by the surrogate and the appraiser, upon the grounds that such provisions are repugnant to the Constitution of the United States, and the decision was in favor of such their validity, all of which appears in the record and proceedings in said suit, manifest errors have happened, to the great damage of the said Alexander E. Orr *et al.*, as executors of the last will and testament of David Dows, Sr., deceased; Richard M. Hoe *et al.*, as executors of the last will and testament of David Dows, Jr., deceased, and Tracy Dows *et al.*, as guardians of the property of David Dows, 3rd, *et al.*, as aforesaid.

Wherefore the said Alexander E. Orr *et al.*, by their attorney aforesaid, pray for the allowance of a writ of error and such other

proceedings as may cause the said errors to be corrected by the Supreme Court of the United States.

HORACE E. DEMING,
Attorney for Petitioners, 11–13 *William Street*,
Borough of Manhattan, New York City, N. Y.

92 Allowed June 10, 1901.
R. W. PECKHAM,
Justice of the Supreme Court of the United States.

93 [Endorsed:] In the Supreme Court of the United States, —— term, 1901. Alexander E. Orr *et al.*, plaintiffs in error, *vs.* Theodore P. Gilman *et al.*, defendants in error. Petition. Horace E. Deming, solicitor for petitioners, 11 & 13 William street, Manhattan, New York, N. Y.

94 In the Supreme Court of the United States, —— Term, 1901.

ALEXANDER E. ORR ET AL., as Executors and Trustees of David Dows, Sr., Deceased; Richard M. Hoe *et al.*, as Executors of David Dows, Jr., Deceased, and Tracy Dows *et al.*, as Guardians of David Dows, 3rd, *et al.*, Infants, Plaintiffs in Error,
vs.
THEODORE P. GILMAN, as Comptroller of the State of New York, and Bird S. Coler, as Comptroller of the City of New York, Defendants in Error.

And now come the plaintiffs in error, by their attorney and counsel, and respectfully represent that they and each of them feel themselves to be aggrieved by the proceedings, order, and decree of the surrogate's court of the county of New York in this cause, as affirmed by the judgment of the court of appeals of the State of New York, and assign error thereto as follows, that is to say:

I.

The alleged basis for the proceedings in said surrogate's court is subdivision 5 of section 220 of article X (entitled Taxable transfers) of the tax law of the State of New York (chapter 908, Laws of 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appoint-

ment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the
95 possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision of section 220, as amended, is unconstitutional, null, and void under section 1 of the fourteenth amendment to the Constitution of the United States, in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law, and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death, in 1890, the testator, David Dows, Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren, David Dows, 3rd, Robert Dows, and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death, in 1890, his said grandchildren (then living) acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks in 1899 to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property the full right to which had vested in them many years before.

It is therefore unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be
96 a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

4. This amendment imposes an unequal, arbitrary, and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground, but is a mere arbitrary selection.

5. This amendment attempts, by arbitrary definition, to change the character of a thing by merely changing its name and by pro-

nouncing that a transfer which is not a transfer to take away the vested property rights of citizens.

II.

The said transfer tax law of the State of New York expressly exempts from taxation all real estate passing to lineal descendants (section 221); said exemption is a general exemption and applies to all estates. Under the definitions in the act, as interpreted by the courts of the State of New York, all property which was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the owner and the property, in the meantime, has been converted into cash or securities.

The decision of the court below in this cause reverses this rule and holds that this exemption only applies to lineal descendants whose property may not have been mentioned in a power of appointment, and that as to lineal descendants whose property has
97 been so mentioned the character of the property at the time of the death of the donee of the power (exercised or unexercised) controls; that in the case at bar, although over two millions of dollars of the property was real estate at the death of David Dows, Senior, descending to lineal descendants, they are deprived of the exemption under section 221, and the real estate is held taxable. By depriving the lineal descendants of David Dows, Senior, of the benefits of the general exemption established by section 221, the plaintiffs in error submit that said amendment of 1897 and the proceedings of the court below in this cause are unconstitutional under the fourteenth amendment to the Constitution of the United States, in that they deprive them of the equal protection of the laws, abridge their privileges and immunities as citizens of the United States, and take their property without due process of law.

III.

The plaintiffs in error submit that in violation of the fourteenth amendment to the Constitution of the United States they have been deprived by the proceedings in this cause of the equal protection of the laws of the said State of New York, their privileges and immunities as citizens of the United States are abridged, and their property taken without due process of law in the following respects:

(1.) Under section four, subdivision sixteen, of said tax law of said State of New York all stocks in incorporated companies liable to taxation upon their capital are exempt from taxation. Despite the protests of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $1,850,000.00 of such stocks of incorporated companies.

(2.) Under chapter eighty of the Laws of 1897 of said State of New York, amending section four of subdivision six of said tax
98 law, bonds thereafter issued for the improvement of the canal of said State of New York are made exempt from taxation. Despite the protest of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $51,000 of New York State canal-improvement bonds.

(3.) Under said chapter eighty of said Laws of 1897, as well as under section seven of the municipal corporations law of said State of New York (chapter six hundred and eighty-five of the Laws of 1892) bonds theretofore issued for the purpose of paying up or retiring the indebtedness of a municipal corporation are exempted from taxation. Despite the protest of the plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $109,000.00 of such municipal corporation bonds.

The plaintiffs in error further submit that the proceedings hereunder are in violation of section ten of article one of the Constitution of the United States in the following respects:

The said statute of the State of New York under which said canal-improvement and municipal bonds were exempted from taxation formed part of the contracts under which said bonds were purchased. The statute under which said court of appeals in this cause holds such bonds now taxable is, therefore, an impairment of the obligation of the contracts under which said bonds were purchased.

IV.

The plaintiffs in error submit that even if said subdivision 5 of section 220 of the transfer tax law be valid the various re-
99 mainders vesting in David Dows, 3rd, Robert Dows, and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property, and that the construction of the transfer tax act under which such remainders are held in this cause to be presently taxable is in conflict with section one of the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law, and denies to such citizens the equal protection of the laws.

Wherefore the said Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April,

1899, the plaintiffs in error herein, pray this honorable court to examine and correct the errors assigned and for a reversal of the order and decree of the said surrogate's court of the county of New York in this cause.

ALEXANDER E. ORR,
RICHARD M. HOE,
TRACY DOWS,
WILLIAM A. NASH, AND
GEORGE B. COOKSEY,
As Executors and Trustees of the Last Will and Testament of David Dows, Sr., and
RICHARD M. HOE AND
TRACY DOWS,
As Executors of the Last Will and Testament of David Dows, Jr., and
RICHARD M. HOE AND
TRACY DOWS,
As Guardians of the Property of David Dows, 3rd, Robert Dows, and Kenneth Dows, Appointed as Such Guardians by the Surrogate of Westchester County, State of New York, on the 8th Day of April, 1899,
By HORACE E. DEMING,
Solicitor for Plaintiffs in Error, 11–13 William Street, Borough of Manhattan, City of New York, New York.

100 [Endorsed:] In the Supreme Court of the United States, —— term, 1901. Alexander E. Orr *et al.*, plaintiffs in error, vs. Theodore P. Gilman *et al.*, defendants in error. Assignment of errors. Horace E. Deming, solicitor for plaintiffs in error, 11 & 13 William street, Manhattan, New York, N. Y.

101 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the surrogate's court of the county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate's court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled "In the matter of the transfer tax upon the estate of David Dows, Sr., deceased," wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the

decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, as by their complaint appears, we, being willing that
102 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

103 [Endorsed:] In the Supreme Court of the United States, —— term, 1901. Alexander E. Orr *et al.*, plaintiffs in error, vs. Theodore P. Gilman *et al.*, defendants in error. Writ of error. Horace E. Deming, solicitor for petitioners, 11 & 13 William street, Manhattan, New York, N. Y.

104 UNITED STATES OF AMERICA, *ss:*

To Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court of the county of New York, State of New York, wherein Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustee- of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this thirteenth day of June, in the year of our Lord one thousand nine hundred and one.

R. W. PECKHAM,

Associate Justice of the Supreme Court of the United States.

105 [Endorsed:] In the Supreme Court of the United States. Alexander E. Orr *et al.*, plaintiffs in error, against Theodore P. Gilman and ano'r, defendants in error. Citation. Horace E. Deming, attorney for plaintiffs in error, 11 & 13 William street, Manhattan, New York, N. Y.

106 In the Supreme Court of the United States, May Term, 1901.

ALEXANDER E. ORR ET AL., as Executors and Trustees of David Dows, Sr., Deceased; Richard M. Hoe *et al.*, as Executors of David Dows, Jr., Deceased, and Tracy Dows *et al.*, as Guardians of David Dows, 3rd, *et al.*, Infants, Plaintiffs in Error,

vs.

THEODORE P. GILMAN, as Comptroller of the State of New York, and Bird S. Coler, as Comptroller of the City of New York, Defendants in Error.

Please enter my appearance as counsel for the defendants in error. I hereby waive the issuance of citation and waive all security for costs or otherwise on this writ of error.

June 10th, 1901.

JABISH HOLMES, JR.,

Attorney for Defendants, 32 *Liberty Street, New York City.*

To James H. McKenney, clerk.

107 [Endorsed:] In the Supreme Court of the United States. Alexander E. Orr *et al.*, plaintiffs in error, against Theodore P. Gilman and another, defendants in error. Notice of appearance. Waiver of bond and issuance of citation. Jabish Holmes, Jr., attorney for defendants in error, 32 Liberty street, Manhattan, New York, N. Y.

Endorsed on cover: File No., 18,204. New York surrogate's court, county of New York. Term No., 351. Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., *et al.*, plaintiffs in error, *vs.* Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York. Filed June 20th, 1901.

No. 351.

Motion to advance.

Office Supreme Court U.S.
FILED
OCT 19 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct. 19, 1901.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

ALEXANDER E. ORR, *et al.*, as Executors and Trustees of DAVID DOWS, Sr, deceased, RICHARD M. HOE, *et al.*, as Executors of DAVID DOWS, Jr., deceased, and TRACY DOWS, *et al.*, as Guardians of DAVID DOWS, 3rd, *et al.*, Infants,

Plaintiffs in Error,

against

THEODORE P. GILMAN, as Comptroller of the State of New York, and BIRD S. COLER, as Comptroller of the City of New York,

Defendants in Error.

No 351.

MOTION TO ADVANCE.

And now come the plaintiffs in error and the defendants in error, and jointly move this Honorable Court to advance this cause upon the docket and hear it at as early a day as the convenience of the Court will permit. The reasons for this motion and application are as follows :—

This cause involves questions of great public importance. Their prompt and authoritative decision is important to the State of New York as well as to the plaintiffs in error. The questions arise under the execution of the law of New York relating to Taxable Transfers (Article X. of the Tax Law of the State). The Surrogate's Court of the County of New York,

whose order and decree is now brought up for review, is virtually the assessing officer or authority of the State for the purpose of fixing taxes under its law relating to taxable transfers.

One of the questions presented on this writ of error relates to the constitutionality and validity of the following provision added to the law of the State of New York, relating to taxable transfers in 1897 :—

> "5. Whenever any person or corporation shall "exercise a power of appointment derived from "any disposition of property made either before "or after the passage of this act, such appoint- "ment when made shall be deemed a transfer tax- "able under the provisions of this act in the same "manner as though the property to which such "appointment relates belonged absolutely to the "donee of such power and had been bequeathed or "devised by such donee by will; and whenever "any person or corporation possessing such a "power of appointment so derived shall omit or "fail to exercise the same within the time pro- "vided therefor, in whole or in part, a transfer "taxable under the provisions of this act shall be "deemed to take place, to the extent of such "omissions or failure, in the same manner as "though the persons or corporations thereby be- "coming entitled to the possession or enjoyment "of the property to which such power related had "succeeded thereto by a will of the donee of "the power failing to exercise such power, "taking effect at the time of such omission or "failure."

The Court of the State of New York of highest jurisdiction holds that this new provision which subjects any property to which a power of appointment relates to a tax under the Transfer Tax Law as though the donee of the power were absolute owner of the property, is valid and constitutional, even though, as the plaintiffs in error contend, title to the property had vested under the Will of the donor of the power long prior to the enactment of this new provision.

Another of the questions presented by this writ of error is, as plaintiffs in error contend, that though the tax imposed by this new provision is clearly a tax

upon property, said statute as interpreted by the Court of highest jurisdiction of the State of New York, deprives the owners of property as to which a power of appointment relates, of the general exemptions of the Property Tax Law of the State of New York, and of the protection of Section I. of the Fourteenth Amendment to the Constitution of the United States, and Section X. of Article One thereof.

Another of the questions presented by this writ of error is the validity of the provisions of the Transfer Tax Law of the State of New York, which the Court of highest jurisdiction of that State holds impose a tax presently payable upon remainders the title to which has vested, but of which the remaindermen have neither enjoyment nor possession.

These questions have never been presented in any other Court in the United States, and until they are determined by this Court they are a necessary and constant source of embarrassment to the owners of property and to the officials having to do with the execution of the tax laws. Property to the amount of millions of dollars are affected in the State of New York.

Under these circumstances counsel respectfully suggest that it is essential that these unusually important constitutional questions should be determined in all their aspects as speedily as may be.

Respectfully submitted,

HORACE E. DEMING,
Counsel for Plaintiffs in Error.

JABISH HOLMES, JR.,
Counsel for Defendants in Error.

Counsel for the defendants in error expects in another legal proceeding in New York to be required to attend abroad in December. It is, therefore, respectfully suggested that if the motion be granted and it accords with the convenience of the court, that the cause be assigned for a day in the last week in November. If the suggestion does not accord with the court's convenience, counsel request that the cause be added at the foot of the causes now already advanced and assigned for October 28.

No. 351.

Brief of Deming for Orr et al.

FILED
NOV 21 1901
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901

Filed Nov. 21, 1901.

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH and GEORGE B. COOKSEY, as Executors and Trustees of the Last Will and Testament of DAVID DOWS, Senior, Deceased, *et al.*,

Plaintiffs in Error.

vs.

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,

Defendants in Error.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

BRIEF OF ARGUMENT

ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF CONTENTION THAT PORTIONS OF THE NEW YORK TRANSFER TAX LAW ARE IN CONFLICT WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

HORACE E. DEMING,
JULIUS HENRY COHEN,
of Counsel for Plaintiffs in Error.

LIVINGSTON MIDDLEDITCH CO., 63 CHAMBERS ST., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 351.

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH and GEORGE B. COOKSEY, as Executors and Trustees of the last Will and Testament of DAVID DOWS, Sr., deceased, *et al.*,

Plaintiffs in Error,

vs.

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,

Defendants in Error.

Brief for Plaintiffs in Error.

This appeal comes to this Court upon a writ of error to the Surrogate's Court of the County of New York, State of New York. The plaintiffs in error are the Executors and Trustees of the last Will and Testament of David Dows, Sr., who died in 1890, the Executors of the last Will and Testament of David Dows, Jr., who died in 1899, and the guardians of David Dows, 3rd, Robert and Kenneth Dows, minor children of David Dows, Jr. (Record, fols. 99-100). The defendants in

error are the Comptroller of the State of New York and the Comptroller of the City of New York (fol. 104).

The questions presented arise out of Article X (entitled Taxable Transfers) of the New York Tax Law (Chap. 908, Laws of 1896), and the so-called "Power of Appointment Amendment" (Chap. 284, Laws of 1897) to Section 220 of said Article. The Amendment is sub-division 5 of said Section 220. It reads as follows:

> "5. Whenever any person or corporation "shall exercise a power of appointment derived "from any disposition of property made either be- "fore or after the passage of this act, such appoint- "ment when made shall be deemed a transfer tax- "able under the provisions of this act in the same "manner as though the property to which such ap- "pointment relates belonged absolutely to the donee "of such power and had been bequeathed or de- "vised by such donee by will; and whenever any "person or corporation possessing such a power of "appointment so derived shall omit or fail to ex- "ercise the same within the time provided there- "for, in whole or in part, a transfer taxable under "the provisions of this act shall be deemed to take "place to the extent of such omissions or failure, "in the same manner as though the persons or cor- "porations thereby becoming entitled to the pos- "session or enjoyment of the property to which "such power related had succeeded thereto by a "will of the donee of the power failing to exercise "such power, taking effect at the time of such "omission or failure."

The plaintiffs in error raised their objections at the very inception of the proceeding (fols. 34-40), upon the appeal to the Surrogate (fols. 44-50), upon the appeal to the Appellate Division of the Supreme Court of New York State, and upon appeal to the Court of Appeals (fols. 60-67), and in each instance the objections were passed upon adversely to the plaintiffs in error (fols. 80-87).

The assignment of errors present these objections to this Court for review (fols. 94-100).

Facts.

David Dows, Sr., died March 30th, 1890. The Transfer Tax Law, then in force (Chap. 483, Laws of 1885, as amended in 1887 and 1889) did not tax transfers by will of the testator's property to lineal descendants.

By the Sixth Division of his will David Dows, Sr., devised and bequeathed certain real estate to trustees for the life of his son, David Dows, Jr., to pay the income thereof to his said son.

> "And upon the death of my said son the said "property with all accumulations of interest, income and profits shall vest absolutely, and at "once, in such of his children him surviving, and "the issue of his deceased children as he may by "his last will and testament designate and appoint "and in such manner, and upon such terms, as he "may legally impose. But in case my said son "David Dows, Jr., die intestate, then said property, with all accumulations of interest, income "and profits shall vest absolutely and at once in "his children him surviving, share and share alike, "and the issue of his deceased children (such issue "to take share and share alike the portion which "the parent would have received by the terms here-"of if living) to be paid to them at the times and "in the proportions following, to wit" (fols 8-10).

By the Eighth Division of his will, David Dows, Sr., devised and bequeathed an undivided one-eighth of his residuary estate in a similar manner (fols. 14-15).

David Dows, Sr., left him surviving David Dows, Jr., and three sons of the latter, namely, David Dows, 3d, Robert Dows and Kenneth Dows. No children were born to David Dows, Jr., after his father's death. He himself died January 13th, 1899, leaving David Dows, 3d, Robert Dows and Kenneth Dows him surviving (fols. 25-26).

David Dows, Jr., appointed the property among said three sons as follows:

Each of the sons has the use and income of an undivided three forty-eighths, an undivided four forty-eighths and an undivided nine forty-eighths of said

property until the son Robert dies or attains twenty-one years, twenty-five years and thirty years respectively, whichever event shall sooner happen. Upon the termination of the respective life estates the principal of said undivided three forty-eighths, four forty-eighths and nine forty-eighths goes in absolute ownership to one or other of the three sons (fols. 19-22).

Each of said life estates and remainders were held to be taxable and were taxed upon their value as it was appraised to be at the death of David Dows, Jr., on January 13th, 1899 (fols. 42-3, 52), and without reference to the character or value of the property at the death of David Dows, Sr., or to the fact that at the death of David Dows, Jr., the corpus consisted in large part of untaxable bonds and stocks (fols. 26, 27, 37-8, 40-1, 32-3, 42-3).

Specification of the Errors.

I.

Subdivision 5 of Section 220 of the Tax Law of the State of New York, whether construed as a tax upon property or a charge for a privilege accorded by the State, is unconstitutional, null and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law, and to deny to such citizens the equal protection of the laws.

(1). Under the law as it stood at his death, in 1890, the testator, David Dows, Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren, David Dows, 3rd, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death, in 1890, his said grandchildren (then living) acquired vested rights in the property transferred. This amendment attempts to diminish

and impair their vested rights. It seeks in 1899 to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property, the full right to which had vested in them many years before.

(2). This subdivision arbitrarily selects certain individuals and subjects them and their property to higher taxes or charges than are imposed upon other individuals or like property of other individuals in the same community.

(3). This subdivision, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax, or charge, upon the property and persons of an arbitrarily selected class. If there happens to be a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised, and every person receiving such property is arbitrarily singled out and taxed or charged at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

(4). This subdivision imposes an unequal, arbitrary, and discriminating tax or charge upon property and persons. Its classification of persons and property is not based upon any reasonable ground, but is a mere arbitrary selection.

(5). This subdivision attempts, by arbitrary definition, to change the character of a thing by merely changing its name and by pronouncing that a transfer which is not a transfer to take away the vested property rights of citizens, and to impose a special charge upon an arbitrarily selected class.

II.

The Tax Law of the State of New York expressly exempts from taxation, or charge, all real estate passing

to lineal descendants by descent or devise, and all such descendants so taking title to real estate from ancestors (Section 221); said exemption is a general exemption and applies to all estates. Under the definitions in the law, as interpreted by the courts of the State of New York, all property which was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the ancestor who owned it, and the property in the meantime has been converted into cash or securities.

The decision of the court below in this cause reverses this rule and holds that this exemption only applies to lineal descendants whose property may not have been mentioned in a power of appointment, and that as to lineal descendants whose property has been so mentioned the character of the property at the time of the death of the donee of the power (exercised or unexercised) controls; that in the case at bar, although over two millions of dollars of the property was real estate at the death of David Dows, Senior, descending to lineal descendants, they are deprived of the exemption under Section 221. By depriving the lineal descendants of David Dows, Senior, of the benefits of the general exemption established by Section 221, the plaintiffs in error submit that said Subdivision 5 of Section 220, and the proceedings of the court below in this cause, are unconstitutional under the Fourteenth Amendment to the Constitution of the United States, in that they deprive them of the equal protection of the laws, abridge their privileges and immunities as citizens of the United States, and take their property without due process of law.

III.

The plaintiffs in error submit that in violation of the Fourteenth Amendment to the Constitution of the United States they have been deprived by the proceedings in this cause of the equal protection of the laws of

the said State of New York, their privileges and immunities as citizens of the United States are abridged, and their property taken without due process of law in the following respects:

(1). Under Section 4, Subdivision 16, of said Tax Law of said State of New York, all citizens of said State are exempt from taxation upon their stocks in incorporated companies liable to taxation upon their capital. Despite the protests of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $1,850,000.00 of such stocks of incorporated companies.

(2). Under Chapter 80 of the Laws of 1897 of said State of New York, amending Section 4, Subdivision 6, of said Tax Law, bonds thereafter issued for the improvement of the canal of said State of New York are made exempt from taxation. Despite the protest of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $51,000 of New York State canal-improvement bonds.

(3) Under said Chapter 80 of said Laws of 1897, as well as under Section 7 of the General Municipal Law of said State of New York (Chapter 685 of the Laws of 1892) bonds theretofore issued for the purpose of paying up or retiring the indebtedness of a municipal corporation are exempted from taxation. Despite the protest of the plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $109,000.00 of such municipal corporation bonds.

The plaintiffs in error further submit that the proceedings hereunder are in violation of Section 10 of Article I of the Constitution of the United States in the following respects:

The said statute of the State of New York under

which said canal improvement and municipal bonds were exempted from taxation formed part of the contracts under which said bonds were purchased. The statute under which said Court of Appeals in this cause holds such bonds now taxable is, therefore, an impairment of the obligation of a contract under which said bonds were purchased.

IV.

The plaintiffs in error submit that even if said subdivision 5 of Section 220 of the Tax Law be valid, the tax upon or charge for the various remainders to David Dows, 3d, Robert Dows and Kenneth Dows cannot be made payable until the remaindermen come into actual enjoyment and possession of the *corpus* of their remainders and that the construction of the Transfer Tax Law under which such remainders and remaindermen are held in this cause to be presently taxable and chargeable, with interest and penalty to be added in case of postponement, is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law, and denies to such citizens the equal protection of the laws.

Preliminary Statement.

When A. dies owning land or commodities, his ownership ceases by the mere fact of death. A dead man cannot own anything. He does not exist. When he ceases to exist, his ownership necessarily ceases to exist.

Neither land nor commodities nor anything else constitute property unless owned by some one. Property necessarily implies an owner. Property except as something belonging to (owned by) some one is simply unthinkable.

To speak of the property or estate of a dead man is to use a mere figure of speech and often a misleading one. What is really meant is the things which he

owned and ceased to own at the moment of death and which continue to exist thereafter.

Upon the death of A. all the things that were his at the moment of death and persist thereafter immediately pass to another owner, become the property of some one. The termination of A.'s ownership and the commencement of the succeeding ownership occur instantaneously and simultaneously.

Who the successor is, whether the State or some one else, is determined by the State, and the State is the successor unless it expressly decrees otherwise. Neither the children nor other relatives of a deceased—much less strangers in blood—are deemed to have any natural right to become the owners of anything he owned at the moment of his death. A. may not give anything, the gift to take effect at A.'s death, unless the State so decrees. And B. may not, at A.'s death, become the owner of anything formerly belonging to A. unless the State so decrees. When, therefore, the property of A. passes to (becomes the property of) B. under A.'s will, it is because the State so directs. It is equally the State which authorizes the passing of A.'s property to B. on A.'s death without a will.

The State may, and sometimes does, say that a part of A.'s property shall become its property, pass to it, and only the remainder to some one else. This succeeding by the State to the ownership of a part of what belonged to A. at the moment of his death is not a taking or a taxing of A.'s property; A.'s existence is at an end, and with it his ownership of anything. Nor is it a taking or taxing of the property of any one else, or a tax upon the transfer of anything to or from A. It is the change of ownership from A. to the State at the moment of A.'s death. What was A.'s becomes the State's. When A.'s ownership ceases the State's begins.

Or, in another form: The things which A. owned at the moment of death and persist thereafter, become necessarily by the mere fact of death, the property of (belong to) succeeding owners. The State, except in so far as it otherwise permits, is the succeeding owner. The State, then, takes nothing, appropriates nothing, taxes nothing belonging to any one else when it retains

to itself any portion of what was A.'s at the moment of his death. On the contrary, the State, except in so far as it voluntarily renounces its right, becomes the succeeding owner at A.'s death of everything belonging to him and persisting thereafter.

The foregoing propositions are self-proving. It would seem unnecessary to state them. But the whole matter of "inheritance taxes" and "transfer taxes," so-called, has been so befogged by subtle distinctions and tortuous reasoning that it is desirable to return to and keep in mind the very simple nature of what happens when a man dies and the State succeeds to the ownership of the whole or a part of what was the decedent's. When A. dies, owning anything capable of continued existence after his death, *his* ownership ceases and simultaneously begins the ownership of the State or of such person or persons as the State chooses. The change or transfer or succession of ownership is instantaneous. There is no interval between A.'s death and the vesting of the successor title.

Just as it is self-evident that the instant when A. dies is the instant when, and when only, the whole or any part of what then belonged to him can pass to (become the property of) the State as succeeding owner; so it is self-evident that, if under the grant of the State a part of what belonged to A. at the moment of death passes to the State and the remainder to others, the State cannot *thereafter* obtain the whole or any part of this remainder except as something belonging to (the property of) those others. Through the State's own conduct it has already become the property of some one else, and the State in dealing with it must treat it not as its own property but as the property of some one else.

We may style the passing to the State of a portion of a decedent's property at the moment of death an "inheritance tax," a "succession tax," a "death duty," or a "transfer tax," but, however styled, the essential nature of the transaction is as described.

In the discussion of "Inheritance Tax" laws, certain

phrases are frequently used which cannot, we think, be made with safety the basis of judicial reasoning or decision.

The following are samples:

"An Inheritance Tax" is not a tax upon property but upon the succession.

What does "succession" mean in this phrase? When A. devises or bequeathes to B., is B.'s succession "*the things B. has succeeded to which were A.'s at the moment of A.'s death?*" If so, then B.'s "succession" is something owned by B., is *B.'s property,* the inheritance tax is a tax upon property, and the phrase quoted is self-contradictory.

Does it mean "*the grant to B. by the State of succeeding at the moment of A.'s death to things which were A.'s?*" If so, this grant is *property.* Nor is its essential character as property changed by styling it a "privilege." It is still property. At any time before A.'s death the State may wholly withdraw or diminish the "privilege," but whatever of it remains at A.'s death is a property right in B., as much as his horse or his house. If this second definition be adopted, the "inheritance tax" is a tax upon property and the phrase quoted is self-contradictory.

Does B.'s "succession" mean "*his succeeding in ownership to something that was A.'s at the moment of death?*" If so, then "succession" means a *change* of ownership from A. to B. This is not property, it is an event. The State cannot tax it any more than it can tax a date, and the expression "tax upon the succession" becomes meaningless.

The truth is that the succeeding by B. to a part of what was A.'s property at the moment of death is not affected by the fact that the State at the same moment succeeds to another part. The part the State retains to itself does not come out of the part to which B. succeeds. The succeeding by B. does not depend upon the succeeding by the State, or *vice versa.* The accurate statement of what happens is that the State succeeds to part and B. to another part. The two events are simul-

taneous and independent each of the other; neither event is conditioned or dependent upon the other.

"'An Inheritance Tax' is an incident of the exercise by the State of the right to regulate the devolution of a decedent's property; the price or bonus exacted by the State as a condition of the transfer of his property."

A price or bonus exacted from whom? Who pays it? It cannot be exacted from the dead man or the dead man's property. A dead man does not exist. He cannot have property. The State must, then, exact the bonus from some living person. If so, it is levying a tax upon his property, and our phrase means, "An Inheritance Tax is a property tax incident to the exercise by the State of its right to regulate the devolution of a decedent's property," &c. No one disputes the State's power to levy such a tax, but that is the very thing which the phrase-maker seeks to avoid.

The right to take property by descent or devise is the creature of the law and not a natural right. It is a privilege and the authority which confers it may impose conditions upon it, may tax the privilege.

We have already analyzed the content of this statement. We might add the following comment: No one doubts that the right to take property by devise or descent is a privilege conferred by the State which may tax the privilege. But is the "right to take property by descent" any less a *property right* because it is called a privilege? It is not right in the abstract but *my* right, something I *own*, my property, while I have it, be it for only an instant or for all time. Of course, the State may tax it, but when the State taxes it the State is taxing property.

We submit, with respect, that the real nature of what is popularly called an "inheritance tax" or "succession tax" is not changed tho' it is obscured by the use of such language as we have commented upon. There is and can be no tax upon an inheritance or succession except as a tax upon property. On the other hand, the State has an undoubted right to succeed to A.'s property when A. dies and his ownership ceases. In the exercise of

this right the size of the part to which the State succeeds depends upon the State's pleasure, but the exercise of the right is limited by the very nature of the right to the moment of A.'s death. We may for convenience or by custom give the name "inheritance tax," "succession tax," or "transfer tax" to the part of a decedent's property to the ownership of which the State succeeds; but the name is unfortunate and confusing, for not only is the thing it is meant to denote not a tax at all, but the very same name is often used for an entirely different concept, a genuine property tax, as in England.

The essential distinction between the State's succeeding at the moment of his death to the ownership of what belonged to a decedent and the State's appropriation by arbitrary fiat or otherwise of what has become the property right of another is of the first importance. Not only are the two things widely different in themselves, but the difference is emphasized when we contrast, for example, what the British Parliament may do and what one of our State Legislatures, in dealing with the property rights of citizens. When Parliament speaks, it is the final word of the sovereign. If that word be arbitrary or unjust, there is no remedy but an appeal to Parliament. Parliament is the State. When one of our Legislatures speaks, it is the voice of an agent of the State, an agent possessing but a limited power of attorney to express the sovereign's will. When a Legislature appropriates by taxation or otherwise the property right of a citizen, he may invoke in his defense the Constitution of his State and of the United States, which greatly restrict legislative invasion of property rights.

The history of Parliamentary legislation and the decisions of English Courts upon them, though interesting to students, afford no criterion of what a legislature of one of our United States may rightly do. In England none of the series of acts of Parliament which since 1796 have made the death of a subject an opportunity to benefit the public treasury has paid any attention to whether the public treasury was filled through the State's succeeding at the moment of death to the

ownership of what was the decedent's or through taxation of the property of the living. In either event, the validity of the Act was undoubted. In fact, the understanding or even the study of the fundamental principles which must underlie any just system of property taxation is comparatively modern. Governments always needed revenue and more revenue. The subject could not withstand the power of the government, and the government paid more regard to the productiveness than to the justice of the tax.

It is in this country, where the conception of a government with limited and defined powers has been in process of realization, that we find the most frequent and the most informing discussions of questions of taxation whether by students of political science or in the decisions of the courts. The Constitutions of almost all of our States limit the legislative power to levy taxes upon property according to the rule of equality; and when a State made the death of a property owner an opportunity to increase the public revenues, the State statute enacted for that purpose could be tested by the standard set by the State Constitution.

Louisiana in 1828, North Carolina in 1846, and Virginia in 1844, enacted "Inheritance Tax" laws. These were the only States, save Pennsylvania, which will be treated separately, in which there were "inheritance taxes" prior to the adoption of the 14th Amendment to the United States Constitution. It is significant that their validity was sustained by the courts not as levying a property tax, but as an exercise by the State of its right to succeed to a decedent's property at his death (*Succession of Mager* (1846), 12 Robinson (La.), 584; *Eyre* v. *Jacob* (1858), 14 Gratt, 422). Before the adoption of the 14th Amendment (1898) the decisions of the State courts upon taxing statutes were rarely before the United States Supreme Court for review. The *Mager* case, however, reached the Supreme Court and the Louisiana statute was sustained as not levying a tax upon property and, therefore, not violating the principle of equality which must be observed by a valid property tax (8 How., 487, decided in 1850).

"Inheritance Tax" statutes have multiplied in recent years and the 14th Amendment has enabled their provisions to be reviewed by the Supreme Court. The most informing decisions by that Court as to the real nature of such a tax are *U. S.* v. *Perkins*, decided in 1896, affirming *In re Merriam*, 141 N. Y., 479, and *Plummer* v. *Coler*, 178 U. S., 115, decided in 1900. In each decision the Court reviewed the New York Act, commonly known as the Transfer Tax Law (the one under which the case at bar arose). In the *Perkins* case a decedent had bequeathed all his property to the United States and the question was whether New York State could retain a part of the legacy as against the United States. In the *Plummer* case, a part of the decedent's property at death was in United States bonds, and the question was whether the State could include in the part retained for itself a percentage of these bonds. The substance of the Supreme Court's decision in each case was that a decedent could bequeath to other than the State only so much of the property he ceased to own at death as the state permitted, that the part retained by the State was not taken out of what was bequeathed to others and was, therefore, not a tax upon property. This part was not bequeathed by him at all, but passed directly to the State at his death.

In the *Perkins* case the Court affirmed the construction of the statute by the New York Court of Appeals, which held in *Matter of Merriam*, 141 N. Y., at p. 484:

> "This tax, in effect, limits the power of testa-
> "mentary disposition, and legatees and devisees
> "take their bequests and devises subject to this
> "tax imposed upon the succession of property.
> "This view eliminates from the case the point
> "urged by the appellant that to collect this tax
> "would be in violation of the well-established rule
> "that the state cannot tax the property of the
> "United States. Assuming this legacy vested in
> "the United States at the moment of testator's
> "death, yet in contemplation of law the tax was
> "fixed on the succession at the same instant of
> "time. This is not a tax imposed by the state on
> "the property of the United States. The property
> "that vests in the United States under this will is

"the net amount of its legacy after the succession
"tax is paid."

In the *Plummer* case the Court held that in order to ascertain the value of the part which passed to the State at decedent's death it was proper to appraise the United States bonds as well as other securities which he owned at death.

The history of the "Inheritance Taxes" in Pennsylvania is very instructive. Not until 1874 did the State Constitution contain any restriction upon the legislative power to tax property. In 1852, the Supreme Court of Pennsylvania, speaking through Gibson, C. J., declared that there was no constitutional restriction upon that power, and upheld a statute imposing a grossly discriminating tax upon property.

> "In England, taxes were laid by the sole au-
> "thority of the king till the reign of Edward the
> "First, who bound himself and his successors to
> "exercise this part of the prerogative only with
> "the assent of the lords and commons; but though
> "it ceased to be royal and became national, it
> "ceased not to be an attribute of sovereign power.
> "* * * But it is a postulate of a state consti-
> "tution, which distinguishes it from the federal,
> "that all the power of the people is delegated by it,
> "except such parts of it as are specifically re-
> "served; and the whole of it is, without exception,
> "vested in the Constitutional *dispensers of the*
> "*people's money. As regards taxation, there is*
> "*no limitation of it.*" (*Kirby* v. *Shaw*, 19 Pa. St., 258, 260 (1852).)
>
> "There is no provision in the Constitution that
> "taxation shall be equal." (*Weber* v. *Reinhard*, 73 Pa. St., 370, 373 (1873).)

It was natural, therefore, that the early decisions of the Pennsylvania Courts upon the "Inheritance Tax" law of that State passed in 1826, should have paid little or no regard to whether that statute or its amendments levied a tax upon property. The *Short* case, decided in 1851 (16 Pa. St., 63), Gibson, C. J., rendering the opinion of the Court, is a notable illustration. Short died a resident of Philadelphia on December 5th, 1849,

leaving personal estate both within and without the State of Pennsylvania. The "Inheritance Tax" law provided that

> "All estates, real, personal and mixed, of every "kind whatsoever, passing from any person who "may die seized or possessed of such estate being "within this Commonwealth, either by will or "under the intestate laws thereof or any part of "such estate * * * shall be subject to a "tax."

In 1850, after Mr. Short's death, and while his estate was in process of administration, the Legislature passed an act declaring that the words "being within this commonwealth," in the section quoted above,

> "Shall be so construed as to relate to all persons "who have been, *at the time of their decease*, or "now may be, domiciled within this common-"wealth; and this is declared to be the true in-"tent and meaning of said act."

Short's executors offered to pay a tax upon the property within the State, but refused to pay upon the property without the State. The Court held:

> "No clause of the Constitution forbids it (the "Legislature) to extend a tax already laid or to "*tax assets not taxed* before; and in establishing "its peculiar interpretation, it has only done in-"directly what it was competent to do directly, "and, therefore, the retroactive form of the statute "was unimportant."

Under the title *Carpenter* v. *Pennsylvania*, the *Short* case went to the United States Supreme Court (17 How., U. S., 456, decided in Feb., 1855). No question was raised as to the inequality of the tax. The main point under discussion was the alleged retroactive character of the taxing statute. Mr. Justice Campbell, speaking for the Court, held that where an estate was in process of settlement it was competent for the State to impose a tax upon *property* not taxable at the time of the probate of the will. The pith of his

opinion sustaining the Pennsylvania act of 1850 is found in the following extracts:

> "The validity of the Act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to *levy taxes upon personal property* belonging to its citizens, but situated beyond its limits, denied * * * If the State during this period of administration and control by its tribunals and their appointees, thinks fit to *impose a tax upon the property*, there is no obstacle in the Constitution and laws of the United States to prevent it." (Citing cases.)
>
> "The Act of 1850, in enlarging the operation of the Act of 1826, and by extending the language of that Act beyond its legal import, is retrospective in its form; but its practical agency is, to subject to assessment, property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And as the Supreme Court has well said, 'in establishing its peculiar interpretation it (the Legislature) has only done indirectly what it was competent to do directly.'"

Even before the 14th Amendment to the Constitution of the United States in 1868, and the equality of taxation amendment to the Pennsylvania Constitution in 1874 the Courts of that State began to recede from their previous position as to "Inheritance Taxes" and to approximate the one mentioned here as correct. (The *Strode* case, 52 Pa. St., 181, the *Eckert* case, 53 Pa. St., 102, both decided in 1866; and see also the later cases, *Mellon's Appeal*, 114 Pa. St., 564; *Howell's Appeal*, 147 Pa. St., 164; *Williamson's Estate*, 153 Pa. St., 508.) The leading case, however, is the *Cope* case, decided in 1899 (191 Pa. St., 1).

The following section was added to the Pennsylvania Constitution in 1874:—

> "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the

"authority levying the tax; but the general as-
"sembly may, by general laws, exempt from tax-
"ation public property used for public purposes,
"actual places of religious worship, places of burial
"not used or held for private or corporate profit,
"and institutions of purely public charity. All
"laws exempting property from taxation, other
"than the property above enumerated, shall be
"void." Art. 9, Secs. 1 and 2.

In 1897 the Pennsylvania legislature passed an Act of which the following is the first section:

"That from and after the passage of this Act
"all personal property of whatsoever kind and
"nature which shall pass by will, or by the in-
"testate law of this State, from any person who
"may be seized or possessed of the same, * * *
"shall be and the same is hereby made subject to
"a tax of $2 on every $100 of the clear value of
"such personal property, after deducting the debts
"of the decedent and costs of administration *
"* * to be paid for the use of the Common-
"wealth; and all heirs, legatees, devisees, admin-
"istrators, executors, and trustees shall only be
"discharged from liability for the amount of such
"taxes * * * by paying the same for the use
"aforesaid as hereinafter directed: Provided,
"That personal property to the amount of $5,000
"shall be exempt from the payment of this tax in
"all estates: And provided, further, that so much
"of the estates of persons heretofore deceased as
"has not been actually distributed and paid to per-
"sons entitled thereto prior to the passage of this
"Act shall be liable to the tax imposed by this law,
"as well as the estates of persons who die here-
"after."

In the *Cope* case this statute was held beyond legislative power either under the provisions of the Pennsylvania Constitution or when tested by the fundamental principles of taxation. Sterrett, C. J., rendered the opinion of the Court:—

"The Act in question has none of the features
"of an intestate law, or of an act regulating the
"disposition of property by will or by instru-
"ments in the nature thereof. On the contrary,

" upon its face, and in all its provisions it is mani-
" festly a tax law, clearly and distinctly predicated
" of the actual existence and general operation of
" an intestate law and a will's act, under the oper-
" ation of one or other of which the personal prop-
" erty intended by its provisions to be subject to
" taxation would pass from the then, as well as sub-
" sequent owners thereof to others, or had thereto-
" fore passed and become vested in others prior to
" the date of the Act under consideration." * * *

" Having thus seen that the Act in question is
" essentially and avowedly a 'tax law' imposing
" a state tax on certain specified personal property,
" and providing for the collection thereof, let us
" briefly inquire whether it offends against the
" fundamental principles of taxation or the pro
" visions of our Constitution relating thereto."
* * *

" 'It is of the very essence of taxation that it
" 'shall be relatively equal and uniform, and, where
" the burden is common, there should be a common
" 'contribution to discharge it. (Cooley, Cont.
" 'Law, 495.)'

" In his treatise on Taxation, 2nd ed., pp. 2, 3,
" the same learned author says:

" 'In an exercise of the power to tax, the pur-
" 'pose always is that a common burden shall be sus-
" 'tained by common contributions, regulated by
" law according to some uniform ratio of equality.
" 'The power is not, therefore, arbitrary, but rests
" on fixed principles of justice, which have for
" their object the protection of the taxpayer against
" 'exceptional and invidious exactions, and is to
" 'have effect through established rules operating
" impartially.

" 'Equality in the imposition of the burden is of
" 'the very essence of the right, and, though absolute
" 'equality and absolute justice may not be attain-
" 'able, the adoption of some rule tending to that
" 'end is ndispensable. Equality, as far as prac-
" 'ticable, and security of property against irre-
" 'sponsible power are principles which underlie the
" 'power of axation as declared ends and principles
" 'of fundamental laws. (Desty on Taxation, 29.
" 'and cases there cited.)' * * *

" By necessary implication, the first clause of
" that Section (Sect. I, Art. 9, Pa. Const.) recog-

"nizes the authority of the legislature to justly and "fairly, but never arbitrarily, classify those sub- "jects of taxation with the view of effecting rela- "tive equality of burdens. A pretended classifi- "cation that is based solely on a difference in "quantity of precisely the same kind of property "is necessarily unjust, arbitrary and illegal. For "example, a division of personal property into "three classes with a view of imposing a different "tax rate on each,—class 1 consisting of personal "property exceeding in value the sum of $100,000, "class 2 consisting of personal property exceeding "in value $20,000 and not exceeding $100,000, "and class 3 consisting of personal property not "exceeding in value $20,000—would be so mani- "festly arbitrary and illegal that no one would at- "tempt to justify it (p. 21). * * *

"If the legislature had authority under the Con- "stitution, to do what was done in this case, they "had like authority to reverse their order of taxa- "tion, &c., and thus impose the tax on personal "property amounting in value to $5,000 and less, "and exempt therefrom all property of some recog- "nized class in excess of that sum; and conse- "quently they have like authority, in every case, "to establish any other arbitrary ratio between the "amount in value of property to be taxed and that "which shall be exempt therefrom, in any class "of subjects (p. 23). * * *

"Appellant's suggestion, that we have a pre- "cedent for exemption in the proviso to our col- "lateral inheritance tax law, has no force when we "recall the fact that said provision was enacted in "1826 (P. Law, 227) long before the adoption of "our present Constitution containing the limita- "tions on the powers of the legislature which we "have been considering. No such limitation ex- "isted in 1826, when the proviso to our collateral "inheritance tax law was enacted, and, of course, "it was a valid enactment, which has never been "repealed or modified" (p. 25).

Both the foundations and the doctrines of the *Short* case have been destroyed in Pennsylvania and the principles advocated in this brief are the law in that State.

There are now numerous "Inheritance Tax" and

"Succession Tax" statutes in the several States, and their validity as tax laws have been the frequent subject of judicial interpretation. The Courts have held, with practical unanimity, that if they are taxes upon property they are unconstitutional and void. And the test as to whether they are taxes upon property is not their names but their essential nature. "The mere calling "of such a tax a 'Succession Tax' does not make it dif- "ferent from an ordinary tax upon property, where "the effect and operation are identical with an ordinary "property tax." (*State* v. *Switzler*, 45 S. W., 245, decided by Missouri Supreme Court in 1898.)

An interesting case arose in California in 1899 (*re Stanford*, 58 Pac., 462) in which the decision turned upon the fact that an "inheritance tax" is the succeeding by the State at the moment of decedent's death to the ownership of so much of what was then decedent's as is expressed by the amount of the tax, and that the State's ownership begins at decedent's death.

The Constitution of California forbids the legislature to make a gift of any public money or thing of value to any individual or corporation. In 1897 the California legislature amended its "Inheritance Tax" law by exempting certain persons and classes and providing the exemptions should "apply to all property which has passed by will, succession or transfer since the approval of the Act of which this Act is amendatory" except when payment had already been made. It was held unconstitutional. The Court says:

> "It is only by virtue of the statute that an heir "is entitled to receive any of his ancestor's estate, "and the legislature can provide that the whole or "only a portion shall go to the heir or other bene- "ficiaries upon the death of the ancestor. This "being so, and the legislature in this case having "determined that 95 per cent. of the decedent's "estate may go to his heirs and beneficiaries, and "that 5 per cent. be retained to the State, it is too "clear for argument that this 5 per cent. vested in "the State at the same time that the 95 per cent. "vested in the heirs or beneficiaries. 'An estate "'is vested when there is an immediate right of "'present enjoyment, or a present fixed right of

"'future enjoyment.' 4 Kent. Comm., 202. The "State here, from the death of the decedent, had a "present fixed right of future enjoyment to the 5 "per cent. of his estate. This is property or a "thing of value belonging to the State" (p. 465).

In a recent case (1898) in Montana (*Hinds* v. *Wilcox*, 55 Pac., 355, 358), Pigott, J., in his opinion says:

"Testator, Wilcox, died in 1896, while the act "imposing a tax upon the privilege of taking by "succession or will was not passed until 1897. At "the time of his decease, every sane person over 18 "years of age might dispose of all his estate by "will, to take effect at his death. The state thus "granted to the testator the privilege of devising "property, and to the beneficiaries named in the "will the privilege of receiving it. This priv-"ilege was not encumbered or charged with the "burden of a tax at the time it was exercised. "Before testator's death, the devisees had a mere "privilege, which was revocable by law, but when "the will took effect the mere pre-existing priv-"ilege was merged into a right. Then it was, if "ever, that the right to take vested and became "property. *Brenham* v. *Storey*, 39 Cal., 179; "*Black Const. Law*, 429; *Cooley Const. Lim.*, p. "359; *Beach, Mod. Eq. Jr.*, Sec. 1045; *Crosw. "Ex'rs & Admin'rs*, Sec. 171; *Westervelt* v. *Gregg*, "12 N. Y., 202; *Ervin's Appeal*, 16 Pa. St., 256; "*Clarke* v. *McCreary*, 12 Smedes & M., 347; *Rock "Hill College* v. *Jones*, 47 Md., 1; Civ. Code, "Secs. 1794, 1851. Vested rights must, of neces-"sity, be protected from legislative interference, "irrespective of constitutional checks and guards. "*Andrews* v. *Russell*, 7 Black, 474; *Town of Dun-"ville* v. *Pace*, 25 Grat., 1. Section 1 of the four-"teenth amendment to the federal constitution, and "sections 3 and 27 of article 3 of the constitution of "Montana, imply, if indeed, they do not express, "a prohibition against the power of the legislature "to enact a law whose effect would be the impair-"ment of a vested right. *Westervelt* v. *Gregg*, "*supra*; *Jones* v. *Robbins*, 8 Gray, 329; *Bank* v. "*O'Kely*, 4 Wheat., 235; *Cooley, Const. Lim.*, "354; *Osborne* v. *Nicholson*, 13 Wall., 654; "*Farrington* v. *Tennessee*, 95 U. S., 679; *Dash* v. "*Van Kleeck*, 7 Johns., 477. Taxes on succes-

"sions and the privilege of taking under wills are "laid in diminution of a new capital, which now "comes to the hands of persons on the death of "the former owner. *Cooley, Tax'n*, p. 22. When "the courts affirm the tax to be upon the privilege, "they are speaking, not of successions in being or "wills in effect before the act imposing the tax was "passed, but of the revocable permission granted "to succeed or take thereafter. The power to tax "includes the power to destroy. If the legislature "has power to levy a tax of 1 per cent. or 5 per "cent. on a vested right, it has authority likewise "to destroy the right by imposing a tax equal to "the value of the property passing to the heirs or "devisees. It is not a question of degree, but of "power. The concession that the legislative as-"sembly has power to subject to a tax the exercise "of a vested and accrued right involves the logical "concession that it may, in the guise of taxation, "impose a burden which will deprive the right of "any value. Authority which permits a person to "be deprived of his property by indirection is as "much within the meaning and spirit of the con-"stitutional limitations as where it attempts to do "the same thing directly. *Merrill* v. *Sherburne*, "1 N. H., 199; *In re Handley's Estate*, 15 Utah, "212, 49 Pac., 829."

From what has been said, it is plain that in examining an "inheritance tax" statute the first question to be determined is, whether it is or is not a tax upon property. If it be a tax upon property, the next question is, whether it observes or violates the constitutional restrictions (State or National) upon the legislative power to impose such taxes. We shall follow that order in presenting our argument in the present case.

The following propositions are abundantly supported by the fundamental principles already discussed.

Assume that the State authorizes the creation of the following estates by will:

A. dies owning $10,000 and by his will gives this $10,000 to B. The passing of title or transfer or succession is complete at the instant of A.'s death. B. becomes at that moment the succeeding owner and holds the $10,000 by a title created and guaranteed by the

State. The state cannot thereafter take it or any portion of it from B. against his will save by taxing it. The $10,000 is B.'s property;

A. dies owning $10,000 and by his will gives the use of the $10,000 to B. for life with remainder to C. At the instant of A.'s death the ownership of the $10,000, carved into the two estates for life and remainder, passes at once to B. and C. Each gets at that instant an absolute property right created and guaranteed by the State. The State thereafter cannot take this property right or any portion of it against the will of the owner save by taxing it.

Assume that the State decrees an "inheritance tax" of ten per cent., *i. e.*, says that a man may dispose by will of only 90 per cent. of what he owns at death and that the remaining 10 per cent. becomes the State's and that A. makes the same bequests as in the previous illustrations;

The bequests under A.'s will are worth but 90 per cent. of their face value to his legatees and beneficiaries. But their property rights in this 90 per cent. vest immediately upon A.'s death, and the State cannot *thereafter* take those property rights or any portion of them against the will of the owner save by taxation.

In brief, though the power to dispose of property by will is a voluntary grant by the State, and until the grant is exercised, the State can limit or wholly withdraw the grant; *after* it has been exercised it is too late for the State to withdraw or limit the grant. It cannot tax the *vesting* of property rights under the will for they have *already* vested. What it may do is to impose a property tax upon these vested rights. In other words, a retroactive "inheritance tax" is in the nature of things a tax upon property.

Applying these principles to the decision of the questions raised in the case at bar, we shall show:

That Subdivision 5 of Section 220 of the Tax Law imposes a tax upon property;

That said subdivision imposes a tax in violation of the Fourteenth Amendment to the Constitution

of the United States whether the tax be regarded as a tax upon property, or as a price or charge for a privilege accorded by the State;

That Article X (entitled Taxable Transfers) of the New York Tax Law, enforces the payment of the "tax" or "charge" imposed by section 220 upon estates in remainder, in a manner contrary to Section I of the Fourteenth Amendment of the Constitution of the United States, and this is so whether the imposition be regarded as a "tax upon property" or a "charge for a privilege accorded by the State";

That whether said Subdivision 5 of Section 220 be construed as imposing a tax or making a charge for a privilege, it arbitrarily creates a particular class of property owners and discriminates against that class for the sole reason that in the chain of title to their property there is a power of appointment (exercised or unexercised);

That said Subdivision 5 of Section 220 imposes a discriminating and arbitrary tax upon property owners in whose chain of title is a power of appointment, exercised or unexercised, in that it taxes in this case stocks in incorporated companies liable to taxation upon their capital, tax exempt bonds of the State of New York, and tax exempt stock of the City of New York; and, further, that the taxation of said canal-improvement bonds and New York City stock is forbidden by Section X of Article I of the Constitution of the United States.

POINTS.

POINT I.

The Power of Appointment Amendment to the New York Transfer Tax Law imposes a tax upon property.

1. *The legislative intent to impose a tax upon property by this Amendment is plain upon its face.*

Any other construction distorts the ordinary meaning of the language used. Read it:

"5. Whenever any person or corporation shall "exercise a power of appointment derived from "any disposition of property made either before "or after the passage of this act, such appointment "when made shall be deemed a transfer taxable "under the provision of this act in the same man-"ner as though the property to which such appoint-"ment relates belonged absolutely to the donee of "such power and had been bequeathed or devised "by such donee by will; and whenever any person "or corporation possessing such a power of appoint-"ment so derived shall omit or fail to exercise the "same within the time provided therefor, in whole "or in part, a transfer taxable under the provisions "of this act shall be deemed to take place to the "extent of such omissions or failure, in the same "manner as though the persons or corporations "thereby becoming entitled to the possession or "enjoyment of the property to which such power "related had succeeded thereto by a will of the "donee of the power failing to exercise such power, "taking effect at the time of such omission or "failure."

Is the intent of the legislature altered one jot if the section reads:

A power of appointment derived from any disposition of property either before or after the passage of this Act shall be deemed a transfer, when exercised or when not exercised, in whole or in part, within the time provided therefor, to the extent that it is not exercised. Such transfer shall be taxable under the provisions of this Act as though the persons becoming entitled to the possession or enjoyment of the property mentioned in the power had succeeded to said property by a will of the donee of the power as absolute owner?

Is there any doubt that the legislature intended no distinction between the exercise and the non-exercise of a power of appointment for the purposes of this Act? That each, without distinction, is to be *deemed* a transfer, that is, is to be treated for *taxing* purposes *as if* it were a transfer? The rate of tax to be determined *as if* the donee of the power were the owner and devised or bequeathed it by will?

Unquestionably the legislature did so intend. There is no pretense that there is an actual transfer or that the donee is the actual owner or that he really devises and bequeathes. Nor did the legislature intend to alter or repeal the statute against perpetuities in favor of the donee of a power of appointment. The plain intent is that for taxing purposes, and for taxing purposes only, a power of appointment is to be deemed a transfer and the property mentioned in it is to be taxed at certain rates established by the statute.

This is entirely within the competency of the legislature provided it does not infringe the limitations set by the Constitution. Whether it does so infringe we do not discuss at the moment. The point to which we direct attention is that the legislature intended to tax property and the term "transfer" is used solely to fix the rate of taxation.

2. *The power of appointment amendment is retroactive in its effect and as such is a tax upon property or else as to the plaintiffs in error it is wholly ineffective.*

David Dows, Sr., died in 1890. In his will he placed certain property in trust to pay the income to his son David Dows, Jr., during the latter's life, with remainder over among his son's children as his son should appoint by will (fols. 8-10, 13-15). These were David, 3d, Robert and Kenneth, all living at the death of David Dows, Sr., and still living at the death of David Dows, Jr., in 1899 (fols. 25-6). David Dows, Jr., appointed the property among them in equal shares (fols. 21-2).

When did the titles to these remainders vest? Or, to put the same question in another form, when did the ownership begin of the right to these remainders upon the termination of the life of David, Jr.? And who were the owners?

Assuming that the power of appointment made no difference in the source of the title or the time when

the title vested—the truth of which we shall presently show—the ownership by the grandchildren of these estates began the instant David Dows, Sr., died. The ownership of David Dows, Sr., ceased then and at the same instant began the ownership by his successors of the several estates for life and in remainder of the *corpus* which David Dows, Sr., owned at death. At the instant of his death there accrued to each grandchild the right to the future enjoyment of the *corpus*, the income of which was to be paid to their father during his life. Each grandchild at the instant of the grandfather's death had a *vested* future estate subject to open and let in after-born children and to be divested by the death of their parent. The only contingency which would defeat their actual possession and enjoyment of the *corpus* (*i. e.*, their remainders vesting in possession) was their death before the death of the parent. This is the settled law of New York. Many authorities might be cited, but *Campbell* v. *Stokes* (142 N. Y., 23), decided in 1894, is sufficient. The provisions of the will there construed are precisely the same as to effects as the provisions of the will of David Dows, Sr.

Under each will the grandchild's actual possession and enjoyment of the *corpus* was in the future, but the right to the future enjoyment was vested. This vested right is *property*. That, when the State takes some of the *corpus*, thus diminishing the very thing the right to the enjoyment of which is already owned by a title guaranteed by the State, it is interfering with property, requires no argument.

We do not dispute the power of the legislature, in the absence of constitutional restrictions, to tax this vested right to future enjoyment, but we desire to emphasize the absolute impossibility, either in fact or in legal fiction, that the legislature levy a tax or duty, impost or excise upon or impose a burden upon or attach a condition to or regulate a "vesting" *after* the vesting has occurred.

3. *It is the settled law of New York that the existence or exercise of a power of appointment does not change either the source or the time of the transfer of title. The property passes by the will or deed of the owner of it (the creator of the power), and necessarily at the date of that instrument.*

The mere existence unexercised of the power of appointment, of course, produces no effect upon a title. This was well known of all men, including the members of the legislature, and this fact emphasizes the intent of the legislature by the Amendment of '97 to reach property.

It is equally well settled that the exercise of a power of appointment does not change either the source or the time of the vesting of title. This also was well known to the members of the legislature and they did not contemplate or intend any change in the law in this respect. What the legislature intended was to reach certain property by taxation and to fix the rate and amount of the tax. Accordingly, it declared, that when the time limit within which a power of appointment could be exercised expires (whether the power has been exercised or not) and the actual beneficial enjoyment of the *corpus* mentioned in the power begins, this coincidence shall for *taxing purposes* be treated *as if* the title to the *corpus* was transferred from the donee of the power as owner to the persons entering upon the actual beneficial enjoyment of the *corpus*. It is to be so treated because in this way the rate and amount of the tax is determined. That this is the true interpretation of the legislative intent is apparent from an examination of the statute, and the Appellate Division of the Second Judicial Department of New York so holds in *Matter of Seaver*, decided in July, 1901. William A. Seaver died in '83, a resident of Westchester County, New York, leaving a will which created a trust in $10,000 the income of which was to be paid to his brother's widow during her life, and giving to her the absolute power of disposing of the $10,000 by her last will. She died

in 1899, a resident of Erie County, New York, leaving a will in which she exercised the power in favor of her son Luke. The Court states the following as one of the questions to be passed upon: "Whether for the purposes and within the meaning of Sec. 220 (the Power of Appointment section) the title passed under the will instead of under the power." Goodrich, P. J., speaking the unanimous opinion of the Court, says:

> "I do not mean to intimate that the *actual* title "to the fund for *other than taxing purposes* was "derived from the mother. The contrary proposi- "tion is true, but section 220 explicitly declares "that it is the exercise and not the creation of a "power of appointment which effects the transfer "upon which the tax is enforced. Hence, the fund "must, for *taxing* purposes, be regarded as having "passed from mother to son." 63 App. Div., 284.

I. e., "the actual title" passed in 1883 upon Seaver's death, "the transfer upon which the tax is enforced" in 1889. This "transfer" can be nothing else than the actual possession and enjoyment of the *corpus*, for the transfer of the actual title, *i. e.*, the right to the enjoyment, passed sixteen years before.

But we do not need this recent judicial confirmation of the principle already well settled in numerous cases in New York and other States, that the title to property mentioned in an exercised power of appointment, like the one in the case at bar, passes from the creator of the power at the time of its creation. The validity or invalidity of the title to property has often depended upon the observance or violation of this principle. It was so held in *Genet* v. *Hunt* (113 N. Y., 158).

Miss Field, in anticipation of marriage with George F. Riggs, executed a trust deed which conveyed all her estate to trustees, to pay the income to her during coverture, and if she died during coverture to convey the property to such persons as she might direct by will. She did die during coverture, leaving two children, and by her last will and testament gave all her estate to her executors in trust to pay the income to her children in equal parts during their lives, with the remainders on the death of either to his heirs and next of kin; in case of

the death of either child during minority and without issue the whole estate was to be held in trust for the survivor during life with remainder to his heirs and next of kin; in case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries. The question to be determined was whether this will made a valid disposition of the property. If the property passed under the *trust deed creating* the power of appointment, then the power of alienation was suspended during three lives, two of which were not in being when the trust deed went into effect. On the other hand, if the property passed by the *exercise* of the power of appointment, then the power of alienation was suspended only during two lives in being. The Court said:

> " *We think the validity of the suspension in the* " *will of Mrs. Riggs is to be determined by the test* " *whether it would be valid if it had been part of* " *the limitation of the trust deed and had been in-* " *serted therein at the time the deed was executed.* " This seems to be the rule of our statute and it is " the rule of the common law in respect to appoint- " ments under special powers " (p. 170).

The Court held that the trusts were created at the date of the deed creating the power, and were, therefore, invalid.

It was well said by Andrews, Ch. J., in the opening words of the Court's opinion in *Hillen* v. *Iselin* (144 N. Y., 365) that "The donee of a special power to appoint an estate given by deed or will is invested with an *authority* merely." The donee has no title to convey or transfer. How can *he* transfer or convey what he has not?

That David Dows, Jr., transferred and could transfer no property or estate by the exercise of the power of appointment in his father's will is well illustrated by the case of *Commonwealth* v. *Williams* (13 Pa. St., 29). In that case a testator had devised property in trust for his daughter during her life, and after her death in trust for such persons as she might appoint by will. The daughter died leaving a will devising the

property to or in trust for her brothers and sisters or their children, lineal descendants of her father. Under the Pennsylvania Inheritance Tax Law if the property passed collaterally (*i. e.*, under the will of the daughter) there was a tax. If it passed lineally (*i. e.*, under the will of the father) there was no tax. The Court says, at page 32:

> "But Mary Williams was never seized of the "estate in fee. She had but a life estate, which "was expended by her death. What she never had "she could not grant. She could not pass the "estate by her will. She could only designate the "persons to whom the estate would pass *by her "father's will.* The devise is after her death to "such persons as she shall appoint by will. She "appointed lineal descendants of her father, and "the estate passed to them by his will. This seems "plain enough, so plain that it is unnecessary to "complicate the question by any discussion about "the nature of the power of appointment. The "authorities sustain the view I have expressed."

The *Harbeck* case decided by the New York Court of Appeals (161 N. Y., 211) is to the same effect. John H. Harbeck died February 2d, 1878. His will gave $300,000 in trust, the income thereof to be paid his widow, Eliza D. Harbeck, during her life, and gave her power to appoint such persons as she might select to take the principal upon her death. The widow died January 16th, 1896, and by her will appointed the property among a number of persons. At Mrs. Harbeck's death the Transfer Tax Law (Chap. 399, Laws of 1892) was in force.

Did the Act affect Mrs. Harbeck's appointees? The Appellate Division held that it did. The Court of Appeals held that it did not.

The part of the Act under consideration was:

> "Section 220. TAXABLE TRANSFERS.—A tax "shall be and is hereby imposed upon the transfer "of any property, real or personal, of the value "of five hundred dollars or over, or of any interest "therein or income therefrom, in trust or other-

"wise, to persons or corporations not exempt by "law from taxation on real or personal property, "in the following cases:

"1. When the transfer is by will or by the in- "testate laws of this state from any person dying "seized or possessed of the property while a resi- "dent of the state.

"2. When the transfer is by will or intestate "law, of property within the state, and the de- "cedent was a non-resident of the state at the time "of his death.

"3. When the transfer is of property made by "a resident or by a non-resident, when such non- "resident's property is within this state, by deed, "grant, bargain, sale or gift, made in contempla- "tion of the death of the grantor, vendor or donor, "or intended to take effect, in possession or enjoy- "ment, at or after such death. Such tax shall also "be imposed when any such person or corporation "becomes beneficially entitled, in possession or ex- "pectancy, to any property or the income thereof "by any such transfer, whether made before or "after the passage of this act.

"Such tax shall be at the rate of five per centum "upon the clear market value of such property, ex- "cept as otherwise prescribed in the next section."

The Appellate Division construed the clause in Subdivision 3 commencing "Such tax shall also be imposed," &c., as applicable to the transfers in each of Subdivisions 1, 2 and 3, and held that, though the Court of Appeals had decided that the Act was not retroactive, the vesting in possession of Mrs. Harbeck's appointees at her death was taxable.

The Court of Appeals affirmed its previous construction that the Act was not retroactive, reversed the Appellate Division and reached the same conclusion as it had already done in the *Seaman* case (147 N. Y., 74) where the Court had under consideration the same Subdivision 3, and, holding that the clause commencing "Such tax shall also be imposed," &c., applied only to grants or gifts *causa mortis*, further held that the remainders under the will of a testator dying in 1876 vested at his death and were not affected by Chap.

399, Laws 1892, though the remainders established by the will did not vest in possession till the death of the life tenant in 1893.

> "A right of succession passed to the four living "children of George at the death of testator [in "1876]. It came from him; it was transferred "by him; taking effect at his death; and passed "then or never. But the right itself, although "vesting in the successors at once, had its own "peculiar character. It could not ripen into pos- "session or enjoyment until the death of the life "tenants, and before that event was contingent "solely as to the persons who should eventually "take and the proportions to be observed. The "legatees as a class were certain; the particular "individuals were alone uncertain." (*In re Seaman*, 147 N. Y., at p. 75.)

The only difference between the facts in the *Seaman* case and those in the *Harbeck* case was the exercise of the power of appointment in the latter. But the Court reaffirmed the correctness of *Genet* v. *Hunt* (*supra*). The Court said:

> "In the language of Chancellor Kent, 'An estate "'created by the execution of a power takes effect "'in the same manner as if it had been created by "'the deed which raised the power. The party "'who takes under the execution of a power, takes "'under the authority and under the grantor of "'the power, whether it applies to real or personal "'property, in like manner as if the power and "'the instrument creating the power had been in- "'corporated in one instrument.' (4 Kent's Com., "338.) So, while the power of appointment did "not take effect until after the death of Mrs. Har- "beck in 1896, it was not the authority by which "the beneficiaries acquired the fund. The source "of their title to the fund was the original will of "John H. Harbeck, which went into effect in 1877, "and into that instrument must be read the names "of the appointees, although designated by a later "instrument. For those who take under a power "of appointment, take as if their names were in "the grant of the power" (p. 218), and again, "the property passed by the will of the owner of

"it and necessarily as of the date of that instru-
"ment" (p. 222).

The *Seaman* and *Harbeck* cases taken together prove conclusively that the *vesting of title to* the remainder and not *the actual possession and enjoyment of the vested* remainder was reached by the Transfer Tax Law as it stood in 1892.

In 1897 (Laws 1897, Chap. 284), Section 220 was amended. The clause in Subdivision 3 commencing "Such tax shall also be imposed" (omitting the "also"), was made a new Subdivision 4; the final clause in Subdivision 3, fixing the tax at five per cent., became Subdivision 6, and an entirely new Subdivision 5 was added, the so-called "Power of Appointment Amendment" already quoted in full.

As we have already seen, this amendment, by its very language, intended a tax upon property, and so far as it is retroactive could not be effective except as it is a tax upon property. No one will deny that in 1890, when David Dows, Sr., died, the laws of the State of New York gave at that time to his grandchildren vested rights to the future enjoyment of the estates appointed to them. *It seems to us clear that no subsequently enacted statute could prevent the vesting which had already happened.* It is equally clear that, admitting, for argument's sake, that the Legislature may tax the vested estate at the moment when the actual possession and enjoyment of its corpus begin, it can only do so by taxing it as already the property of its possessors who in this case are David Dows, 3rd, Robert Dows and Kenneth Dows, minor children of David Dows, Jr.

4. *The opinion in the Vanderbilt case upon which rests the decision of the Court below in the case at bar demonstrates that the tax under the Power of Appointment is a tax upon property.*

The decision of the Court below rests upon *in re Vanderbilt* (163 N. Y., 597) which affirmed without opinion the decision of the Appellate Division. The

opinion of the latter Court (50 App. Div., 246) is printed in full at pages 38 to 42 of the Record. It is significant that the cases relied upon to support the reasoning and conclusions in the *Vanderbilt* case were solely cases affirming, upon the particular facts in those cases, the right of the legislature to tax property. The main reliance of the Appellate Division was *Carpenter v. Pennsylvania* (the *Short* case) already discussed, in which the question under consideration was the validity of a property tax levied by the legislature at a time when there were no constitutional restrictions upon such taxes in Pennsylvania. And, as we have seen, the doctrine of the *Short* case has been repudiated in Pennsylvania. The decision of the Court below in the case at bar rests upon the decision in the *Vanderbilt* case; the decision in the *Vanderbilt* case upon the decision in the *Short* case upon a property-taxing statute half a century ago before the equality of taxation clause was in the Pennsylvania Constitution and before the existence of the Fourteenth Amendment to the Constitution of the United States. This does not seem to us a sound foundation.

The facts in the Vanderbilt case were:

> "William H. Vanderbilt died in 1885, and his "will was admitted to probate in the month of "December of that year. The trust fund involved "in this proceeding was established in favor of his "son Cornelius, who was to enjoy the income for "life. The testator directed that upon the death "of Cornelius the fund should be paid to his law-"ful issue in such shares or proportions as Cor-"nelius might by his last will have directed or "appointed, and in default of such appointment "the gift is made directly to the issue with an al-"ternative disposition on failure of such issue. "Cornelius Vanderbilt died in 1899, leaving a last "will and testament, which was duly admitted to "probate, and in and by which he exercised the "power given by the will of his father, by appoint-"ing a certain specified portion of the fund to "one of his sons and directing that the balance be "equally divided among his other children. At "the time of the death of William H. Vanderbilt,

"*this fund*, or the *right of succession* to it, was not "taxable under the collateral inheritance tax law." (Fol. 70.) "The Surrogate decided and decreed "that the *fund* is subject to a transfer tax of one "per cent. under and pursuant to Chap. 284 of "the Laws of 1897," the "Power of Appointment-"ment Amendment" (fol. 71). The Court said:

"It was held in *Carpenter* v. *Pennsylvania* (17 "How., U. S., 456) that where an estate was ac-"tually in the process of settlement, it was compe-"tent for the State *to impose a tax upon property* "not taxable at the time of the probate of the will. "The remarks of Mr. Justice Campbell in that "case upon the subject are convincing. The ex-"act situation of the fund in this case, as affected "by the question is the following: For purposes "of general construction and *the derivation of* "*title* to the fund as it now stands, the gift of the "remainder comes under the will of William H. "Vanderbilt. When he died, the law as it then "existed made no provision for the *taxation of* "*the ultimate right of succession* to the fund. "The legal title to it upon the probate of his will "was in his executors until they accounted in the "Surrogate's Court, constituted the fund out of "the assets of the estate, and transferred it from "themselves as executors to themselves as trustees, "which we assume in this case was done. Then "they held the fund still under the will, but un-"distributed and finally undistributable until the "power of appointment was exercised by Corne-"lius Vanderbilt. Meantime, and while they held "it so undistributed in fact, the State in the exer-"cise of its general power of taxation, found it "expedient to *tax the right to the succession*, which "right had not theretofore been taxed, making the "transfer consist in that act by which each of the "appointees became entitled to claim and to receive "the particular or specific distributive share al-"lotted to him. Of the general power of the "State to fix the time at which *the right* of suc-"cession shall be taxed, and to define what shall "be a transfer within the meaning of that act, "we have no doubt, so long as that definition does "not involve a violation of either contract or "vested rights." (Fols. 74-5.)

This is the pith of the opinion, and no one will dispute the truth stated in the concluding sentence.

Apparently, the learned Justice uses the expressions "ultimate right of succession" and "right of succession" as interchangeable and as meaning the actual possession and enjoyment of the *corpus* of his remainder by the remainderman. But whether he means this or means the vested right which accrued to the grandchildren at their grandfather's death to the future enjoyment of the *corpus*, the thing reached by the tax is not *res nullius;* it is already owned and can only be taxed, if at all, as property.

The learned Justice who delivered the opinion of the Court below in the case at bar (printed in full at pages 44 to 48 of the Record), after stating that the Court was concluded by the *Vanderbilt* decision already made, added this further exposition of what was meant by the statute's definition of "transfer" in the "Power of Appointment Amendment":

> "It is insisted, however, that the title of the "present owners is deduced from the will of David "Dows, Sr., and not from that of his son, David "Dows, Jr., and in support of this claim are cited "the cases of *Genet* v. *Hunt* (113 N. Y., 158) and "*Matter of Harbeck* (161 N. Y., 211). The "proposition is doubtless true to a certain extent. "For the purpose of determining whether the exe- "cution of the power is in contravention of the "statute of perpetuities, the estate created under "such power must be referred back to the instru- "ment granting the power. *This is settled law* "and was so held in *Genet* v. *Hunt* (*supra*). Any "other rule would permit the evasion of the statute "against perpetuities by the grant of powers" (fols. 82-3).

i. e., the actual source of title and the time of its transfer or vesting is not changed by this taxing statute and *Genet* v. *Hunt* is still the law as it was before this taxing statute was enacted. The learned Justice continues:

> "But, whatever be the technical source of title "of a grantee under a power of appointment, it "cannot be denied that in reality and substance it

"is the execution of the power that gives the "grantee the property passing under it" (fol. 83).

The learned Justice has just affirmed as "settled law" the *Genet* case which holds that there is no such thing as "property passing under a power" and that the property passes under the instrument creating the power. Calling the doctrine "technical" does not change its character as settled law nor weaken its "reality and substance" in determining the validity of titles. The doctrine of *Genet* v. *Hunt* is a very serious reality to the owners and purchasers of real estate in New York. We submit that the phrase "property passing under a power" is too loose and general an expression for the foundation of any judicial argument. We might paraphrase the sentence in the learned Justice's opinion as follows:

"But whatever be the technical source of title "of a remainderman, it cannot be denied that in "reality and substance it is the termination of the "life estate which gives him the property."

i. e., the enjoyment, the possession. But this possession and enjoyment cannot be taxed as a metaphysical entity, it is property. The learned Justice realizes this and attempts a further explanation:

"The will of Dows, Sr., gave his son a power of "appointment, to be exercised only in a particular "manner, to wit, by last will and testament. If, "as said by the Supreme Court of the United "States, the right to take property by devise is not "an inherent or natural right, but a privilege ac- "corded by the State, which it may tax or charge "for, it follows that the right of the testator to "make a will or testamentary instrument is equally "a privilege and equally subject to the taxing "power of the State. When David Dows, Sr., "devised *this property* to the appointees under the "will of his son he necessarily subjected *it* to the "charge that the State might impose on the priv- "ilege accorded to the son of making a will. That "charge is the same in character as if it had been "laid on the inheritance of the estate of the son

"himself—that is, for the privilege of succeeding "to property under a will" (fol. 83).

This reasoning seems to us sophistical; like one of the old-time metaphysical arguments of the school men it is in reality a play upon words and will not bear analysis or comparison with the facts. The learned Justice has just explained that *Genet* v. *Hunt* still expresses the settled law in New York, that the power and the instrument creating the power are one instrument, that the donee's exercise of the power is in law the donor's act, occurring at the date of the instrument creating the power and shown that no other view is possible without creating chaos in titles and upsetting the whole law of powers. Necessarily, therefore, the devise to David Dows, Sr.'s grandchildren under his will passed to them, became their property, at the instant of his death in 1890, and the learned Justice so declares. "*But,*" he says, "the right to take property by devise is a 'privilege' which the State may tax or for which the State may charge, and, therefore, the property which passed to the grandchildren by devise years before is subject to a later tax or charge, which is not to be regarded as a tax upon property, though taken out of their property, because the right of David Dows, Sr., to make a will containing a power of appointment made the execution of the power by will subject to a subsequent charge by the State for the 'privilege' of making a will; and whatever charge the State makes for such 'privilege' is only in seeming taken out of the property which passed to the grandchildren at their grandfather's death; that such charge is the same in character as if it had been laid for the 'privilege' of succeeding to property under a will."

It is plain enough that in reality and substance the "charge" is taken out of the grandchildren's property long after the right to that property vested in them, and that the "charge" is, and must be, a tax upon property however we may attempt to disguise the disagreeable fact by verbal dialectic.

The smooth sentences of the learned Justice ignore

also another important fact. The power of appointment and its execution are parts of the instrument creating the power, the will of David Dows, Sr.; and neither of them can be construed or considered as any portion of David Dows, Jr.'s, will without overruling the *Genet* case, which the Court not only expressly declines to do, but, on the contrary, reaffirms.

In another respect, also, the reasoning of the learned Justice is fundamentally unsound. When David Dows, Sr., died, the "privilege" of making a will containing a power of appointment which could be executed by deed or will was a part of the law of the State of New York. This "privilege" was exercised and the consequences of it became *property rights* the instant David Dows, Sr., died. One of the property rights that then vested was the right of David Dows, Jr., to exercise the power of appointment. The right to use this power in the manner set forth in David Dows, Sr.'s will was a most valuable property right vested in David Dows, Jr. If the State can tax it at all after the death of David Dows, Sr., it must tax it as property (*re Cope*, 191 Pa. St., 1; *re Stanford*, 58 Pac., 462; *Hinds* v. *Wilcox*, 55 Pac., 355; *Westervelt* v. *Gregg*, 12 N. Y., 202, *supra*).

We have already (p. 12), ante) analyzed the statement that "the right to take property by descent or devise is a privilege, and the authority that confers it may tax the privilege" and shown its true content. It is only by regarding the "Transfer Tax," as it is called in New York, "the Inheritance Tax" or "Succession Tax," as it is usually called elsewhere, as something which passes directly to the State when decedent's ownership ceases, that we avoid the conclusion that such "tax" is a taking by the State of the property of a citizen. If, after, with the State's consent, I have given at my death a power to designate the recipients of what was then mine, the State taxes the designation and collects the tax out of the property conveyed by my will, is it not a very thin subterfuge, an intentional blinking of the truth, to say that this tax is not upon the property conveyed? Is not the view, admittedly

adopted merely for taxation purposes, that a donee of a power in exercising it is making his own will, and that such exercise is not a part of the donor's will creating the power, just such a subterfuge?

The *Seaver* case (*supra*) shows how transparent the subterfuge is. It will be remembered that Seaver died in 1883, a resident of Westchester County. His brother's widow, for whose benefit he created the trust to pay her the income of $10,000, with remainder to whom she might appoint, died in 1899, a resident of Erie County. In New York, wills must be proved in the county of testator's residence at death. His estate was administered in Westchester County, hers in Erie. She never had any title to the fund. She was simply beneficiary of a trust. She could and did convey nothing. Her executors, of course, had nothing to do either with the fund or its income. Yet, upon her death, her son, Luke, the appointee of the fund, is for *taxing* purposes adjudged to receive the fund under his mother's will as if she were the owner; and Seaver's testamentary trustee, who never had any power to alienate the fund, whose qualified fee existed solely for the purposes of the trust and expired with the life estate, and who had no control over the remainder to Luke, is called before the Surrogate's Court of Erie County and made personally liable for the amount of the tax if he turns over the fund to the remainderman without first taking out of it for the State the amount of the tax. If this is not a tax upon property, what is it?

The Appellate Division, in affirming the judgment of the Surrogate as approving the rule laid down in the *Vanderbilt* case, said through its presiding Justice:

> "I do not mean to intimate that the actual title "to the fund for other than taxing purposes was "derived from the mother. The contrary propo- "sition is true." (63 App. Div., at p. 285.)

What a solemn farce it all is! And what a dangerous invasion upon the property rights of citizens! Of what avail are the Constitutional guarantees of

equality of taxation if such a subterfuge meet with the approval of the Courts? Does not the reasoning of the Court below in the case at bar (quoted *supra*) point clearly to what dangerous lengths we may yet go if the fair seeming but specious doctrine that "a privilege accorded by the State may be taxed or charged for," is made the sufficient test of the Legislature's authority to tax? Is it not time to call a halt? Have we not already reached the *reductio ad absurdum* point in applying that doctrine? If I own property and desire to exchange it for property you own and are willing to give in exchange, or if I desire to give property outright to you, is not "the right to convey property and the right to receive property a creature of the law, each a privilege accorded by the State which it may tax or charge for?" And since these are "privileges" may they not be taxed or charged for with little or no regard for the safe-guards against unjust and unequal taxation which our Constitution is supposed to provide?

The learned Justice who delivered the opinion of the Court below in the case at bar shrinks from the logical consequences of his own reasoning and concludes the part of his opinion already quoted:

> "Had the fund passed in default of an exercise
> "of the power of appointment, a very different
> "proposition would be presented. We express
> "no opinion on the question whether, under such
> "circumstances, the tax imposed by the amend-
> "ment of 1897 could be deemed other than a tax
> "on the property itself" (p. 232).

But why? Is it not as much a "privilege" to enter upon the actual possession and enjoyment of property mentioned in a power of appointment if the power is unexercised as if it is exercised? If a "privilege" accorded by the State is the basis of the "charge," why should not the Sate charge for the privilege in the one case as well as the other? It is the "privilege" of enjoying the same property.

The so-called "Inheritance Taxes" can be sustained upon a sounder basis than a resort to so dangerous and

specious a doctrine as the one relied upon by the Court below in this case, from the logical consequences of which the Court itself shrinks, and which has already compelled the mental dislocation involved in considering that the real ownership of property passes at one time and the taxing ownership of the same property at another.

5. The legislative intent by the Amendment of 1897 to tax property is further shown by reading Section 220, Subdivision 5 (the "Power of Appointment Amendment") with the preceding portions of the Section.

In our analysis of the Appellate Division stage of the *Harbeck* case (*supra*) we set out the words of the statute before and after the amendment of 1897. It will be recalled that the Appellate Division held that the transfers to Mrs. Harbeck's appointees were taxable under Subdivision 3 as it read at her death, but was reversed upon the ground that Section 220 was not retroactive and that the title to the remainder had vested long prior to the existence of that Section.

In 1897 the Section was recast (page 36 *ante*) and the sentence beginning "Such tax shall be imposed," &c., made into a Subdivision 4 and applicable to the "transfers" described in Subdivisions 1, 2 and 3. Section 220, Subdivision 1, applies to all wills of testators dying after its adoption in 1897, and no one will dispute that the appointee under a power in such a will takes his title from the testator by a transfer under this subdivision. This is the *actual* transfer of title. Under Subdivision 4 the tax upon this transfer is imposed when the appointee becomes beneficially entitled in possession or expectancy to the property. Under Subdivision 5, the "Power of Appointment Amendment," another "transfer" is *deemed* to take place when the time limit for the exercise of the power expires. This also is taxable. The rates of the two taxes and the amounts of the exemptions may be quite different. For lineals, the rate is one per cent. and the exemption

$10,000; for a nephew or niece, the rate is five per cent. and there is no exemption. Under Subdivision 4 relationship (or lack of it) to the testator determines the rate and amount of exemption, and under Subdivision 5 the relationship (or lack of it) to the donee of the power. As to wills of testators dying after 1897, therefore (according to the "price" or "privilege" method of reasoning), when the State has had its "price" or "charge" for the "privilege" of the "*actual* transfer" under the provisions of Subdivisions 1 and 4, it charges again for the "privilege" of the "*deemed* transfer" under the provisions of Subdivision 5.

No other logical conclusion is possible, for there is no repeal of the tax upon the transfer under Subdivision 1 payable under Subdivision 4 at the rate fixed by Subdivision 6 and Section 221; and there is another transfer under Subdivision 5, the rates and amounts of tax being also fixed by Subdivision 6 and Section 221. There are thus two transfers, each taxable, a real transfer and an artificial transfer for taxing purposes only.

For example: Let A. die childless in 1898 bequeathing by his will property to trustees for the life of B., his widow, to pay the income to her during her life and granting B. authority to appoint among his nephews and giving in default of such appointment the remainder to said nephews, share and share alike. Let B. die in 1899. At A.'s death in 1898 there is a transfer to the nephews taxable at the rate of five per cent. (Tax Law, Section 220, Subdivisions 1 and 4, *Genet* v. *Hunt, Matter of Seaman, Matter of Harbeck, supra,* and the Court of Appeals opinion in the case at bar). At B.'s death in 1899 there is another transfer whether she exercises the power or not (Tax Law, Section 220, Subdivision 5, *re* Vanderbilt, *supra*). This transfer is also taxable at the rate of five per cent.

Take another example: Let A. die childless in 1898 leaving minor children and no widow, and bequeath property to trustees to pay the income for the benefit of the children until the youngest child dies or attains the age of twenty-one years, whichever event shall sooner occur, and granting authority to B. to appoint the prop-

erty among the children and giving in default of such appointment the remainder to said children, share and share alike. As before, there is a transfer to A.'s children upon his death in 1898. This transfer is taxable at the rate of one per cent. When the youngest child attains the age of twenty-one years there is also another transfer. This transfer is taxable at the rate of five per cent.

These examples illustrate the wholly artificial character of the imaginary transfer set forth in Subdivision 5 and may serve to emphasize that the real thing taxed under that Subdivision is the property owned by the transferees under Subdivision 1. Incidentally, also, they show the essential inequality and injustice of the "tax" or "charge for a privilege" which Section 220, Subdivision 5, imposes.

6. That the legislature by the Amendment of 1897 intended to tax property is shown not only by the language of that amendment, but by the fact that the legislature has, by a series of enactments added to the Transfer Tax, shown that it intended by the Amendment of 1897 to inaugurate the definite policy of taxing property under the provisions of that law.

We have pointed out that there was and could be no *actual* transfer from David Dows, Jr., at his death, for he had nothing which he could transfer, and that the transfer was from David Dows, Senior, nine years before. This "transfer" might as well have taken place in the previous century so far as any subsequently enacted law could tax it. A transfer expends itself in the happening. It goes without saying that no price or toll as a condition of the happening could be exacted after the happening. The result of the transfer, the thing transferred, persists, and it is this which is the subject of the tax. In other words, it is the property itself. We do not dispute the right of the legislature to tax property; but it seems to us that Subdivision 5 of Section 220 is nothing if not a tax upon property.

It may please the legislature to call the exercise or non-exercise by the donee of a power of appointment a transfer from such donee to the recipient of the property referred to in the appointment, but the donee having nothing to transfer can transfer nothing. A definition even by the legislature does not change the real nature of the thing defined. The actual thing that happens upon the death of the donee of a power of appointment, who has exercised or failed to exercise the power, is not a transfer from the donee, or the donor of the power (the transfer from the donor of all his rights had occurred long before), but the entering by somebody into the enjoyment of the rights transferred by and from the donor. These property rights are and must be what are taxed by Subdivision 5, for there is nothing else to be taxed or out of which the tax can be paid.

The sensible interpretation of Subdivision 5 seems to us to be that whenever, after the exercise of or the failure to exercise a power of appointment, any one becomes beneficially entitled to the property mentioned in such power, the value of such property rights shall be taxed at rates determined by the degree of relationship between the donee of the power and the person entitled to the property rights in question, *as if* the donee had owned the property and bequeathed it to the person receiving it.

The meaning of the provision thus becomes clear, it imposes a tax upon property.

This is in accord with the general legislative policy since 1896.

The Legislature by successive amendments has more and more clearly shown that as to various classes of estates the "transfer" theory no longer applies, that as to those classes the intent of the statute is to *reach the property itself when* its recipients enter into its actual possession and enjoyment, in marked analogy to the English Succession Tax Law, which is frankly a tax upon property.

> "* * * *Whether the power was derived*
> "*from a disposition of property made either be-*
> "*fore or after the passage of this act* * * *
> "whenever any person * * * shall exercise

"a power of appointment * * * such ap-
"pointment when made shall be *deemed* a trans-
"fer taxable under the provisions of this act in
"the same manner *as though* the property to which
"such appointment relates belonged absolutely to
"the donee of such power and had been bequeathed
"by such donee by will." (L. 1897, Chap. 284.)

And if the power is not exercised "a transfer
"taxable under the provisions of this Act shall be
"*deemed* to take place to the extent of such omis-
"sion or failure, in the same manner *as though*
"the persons * * * thereby *becoming en-*
"*titled to the possession* or enjoyment of the *prop-*
"*erty* * * * had succeeded thereto by a will
"of the donee." * * * (L. 1897, Ch. 284.)

"The *increase of benefit* accruing to any person
"* * * upon the extinction or determination
"of [a] charge, estate or interest * * * [sub-
"ject to which the property was transferred] shall
"be *deemed* a transfer of property taxable * *
"*as though* the person beneficially entitled
"thereto had *then* acquired such increase of
"benefit from the person from whom the title
"to their respective estates or interests is derived."
(Laws 1897, Chap. 284.)

"*But any property heretofore* or hereafter de-
"vised or bequeathed to any person who is a bishop
"or to any religious corporation shall be exempted
"from and not subject to the provisions of this
"Act." (L. 1898, Chap. 88.)

"*All estates upon remainder or reversion which*
"*vested prior to June 30th, 1895*, shall be * *
"*taxed* when the person beneficially interested
"shall come into actual possession or enjoyment."
(Laws 1899, Chap. 76.)

"The (*property*) exemptions enumerated in
"Section Four of the Tax Law [the General Prop-
"erty Tax Law of the State], of which this Article
"(Transfer Tax Law) is a part, shall *not be con-*
"*strued* as being applicable in any manner to the
"provisions of Article Ten (Transfer Tax Law)
"hereof." (Laws 1900, Chap. 382.)

"Estates in expectancy which are contingent
"or defeasable and in which proceedings have not
"been taken * * * shall be appraised at their
"*full undiminished value* when the person entitled
"thereto *shall come into the beneficial* enjoyment
"or possession thereof." (Laws 1901, Chap. 173.)

"All estates in remainder or reversion which "*vested prior to May 1st, 1892*" shall be "*taxed* "when the persons beneficially interested shall "come into actual possession or enjoyment." (Laws 1901, Chap. 173.)

We submit that no one can read this series of enactments without the conviction that beginning with the "Power of Appointment Amendment" of 1897, the legislative policy in New York has departed widely from the strict lines laid down by the *Merriam* and other cases (*supra*) as the true basis for "Transfer Taxes," and is now attempting to tax property.

POINT II.

The power of appointment of 1897, imposes a tax in violation of the Fourteenth Amendment to the Constitution of the United States, whether the tax be regarded as a tax upon property, or as a price or charge for the privilege accorded by the State.

The foregoing proposition needs illustration rather than argument:

"Equality in right, in protection, and in burden, "is the thought which has run through the life of "this nation and its constitutional enactments from "the Declaration of Independence to the present "time. Of course, absolute equality is not attain- "able, and the fact that a law, whether tax law or "other, works inequality in its operation, does not "prove its unconstitutionality. * * * But "when a tax law directly, necessarily, and inten- "tionally creates an inequality of burden, it then "becomes imperative to inquire whether this in- "equality, thus intentionally created, can find any "constitutional justification."

"It is apparent that the mere fact of classifica-
"tion is not sufficient to relieve a statute from the
"reach of the equality clause of the Fourteenth
"Amendment, and that in all cases it must appear,
"not only that a classification has been made, but
"also that it is one based upon some reasonable
"ground—some difference which bears a just and
"proper relation to the attempted classification—
"and is not a mere arbitrary selection."

1. *The unconstitutionality of the Power of Appointment Amendment as a tax upon property.*

We think that we have demonstrated that the tax imposed by the Power of Appointment Amendment of 1897 is a tax upon property. Assuming it to be such a tax, it is clearly unconstitutional and void under the provisions of the Fourteenth Amendment to the United States Constitution. The Law of 1897 arbitrarily selects a particular class of property owners and fixes a rate of tax upon their property according to an arbitrary system based upon no reasonable ground nor upon any just or proper relation to the attempted classification. Under this law every person as to whom there is found a power of appointment in the chain of title to his property is placed in a special class by itself; and upon the expiration of the time limit within which the power can be exercised such property is taxed at special rates fixed by the arbitrary assumption that the donee of the power was the prior owner and grantor of the property, and by the accidental degree of relationship or no relationishp of such donee with him.

Consider: The donee of a power who admittedly is not and cannot be the owner of the property mentioned in a power of appointment is first for purely taxing purposes declared by legislative fiat to be the true owner; then the Legislature declares that the degree of *his* relationship with those who get their title to the property from the actual owner and can get it from no other source shall fix the rate of tax! Can anything be more absurd, more arbitrary, more unjust, as a basis for taxation?

2. *The unconstitutionality of the Power of Appointment Amendment as a "price" or "charge" for "a privilege accorded by the State."*

The Constitution of the United States guarantees the equal protection of equal laws to every citizen. Is the equal protection of equal laws afforded to one who, because he inherits property mentioned in a power of appointment, is put into a special class and made to pay a special price based, not upon his consanguinity with the testator who owned and bequeathed the property, but upon the accident of his relationship or lack of it with some one who did not own the property and had no interest in it? Is this not arbitrary, unjust, discriminating classification? A mere arbitrary selection based upon no reasonable ground? Why not make relationship with the President of the United States or the Governor of the State, or the King of Denmark the test? They, too, might be "deemed" owners for taxing purposes by the Legislature. How far may the Legislature go upon the "charge for privilege" theory? Can the Legislature make the age or sex of the legatees or color of hair or eyes the basis for the amount of the "charge"?

We submit that there is a fundamental principle involved in the application of even the "charge for privilege" doctrine; the amount of the charge must have some reasonable basis; it must not be purely arbitrary; and if there be classification in charges, the ground for the classification must be at least reasonably just and proper. What just and proper relation to the charge for the privilege of enjoying the property mentioned in a power of appointment has the consanguinity or lack of it between the mere donee of a power and the recipients of the property?

Possibly such a "tax" or "charge" might be sustained as an exercise of the police power to suppress powers of appointment or diminish their number, but not otherwise.

If the Court agrees with the conclusions already reached there will be no occasion for it to consider the other matters which are discussed in this brief. But if the Court should hold that further argument is either desired or necessary, there are still some important questions remaining which we submit for its consideration.

POINT III.

Article X (entitled Taxable Transfers) of the New York Tax Law, enforces the payment of the "tax" or "charge" imposed by Section 220 upon estates in remainder, in a manner contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States; and this is so whether the imposition be regarded as a "tax upon property" or a "charge for a privilege accorded the State."

For the purpose of the argument under this head we may leave out of consideration any suggestion of a power of appointment in the chain of title of the remainderman.

The New York Transfer Tax Law declares that under the will of a testator bequeathing property to A. for life with remainder to B, the tax or charge upon the "transfer" to B. attaches upon the testator's death, and must be paid at once, or interest will run at six per cent., and presently additional interest as a penalty until the tax or charge be paid (fols. 84 and 85; section 223 of Tax Law).

Now this tax, or charge, if paid, must be paid out of something and by somebody. The statute requires that it be paid out of the property transferred, and executors may not secure their discharge till it is paid, and are personally liable if it is not paid. (Sections 222 and 224 of Tax Law.) In the case of a remainder, when the personality of the remainderman is uncertain, a different rule prevails. In such case the tax or charge is made at the death of the testator, but payment is not required, interest does not run, and there is no penalty until the remainderman is ascertained (fols. 85 and 86). Usually this occurs when the actual possession and enjoyment of the *corpus* of the remainder begin. The State proceeds upon the theory that in the first case there is a known person against whom a judgment for the amount of the "tax" or "charge" can be enforced, and in the second case neither the amount of such "tax" or "charge" is known, nor the person against whom can be enforced a judgment therefor until the time stated. In both cases the payment is to be made out of the property transferred.

The facts of the case at bar fall under the first of these classes, and the statute requires the payment of the "tax" or "charge" upon the remainder of David Dows, 3rd, Robert Dows and Kenneth Dows, at their appraised value on January 13th, 1899, the date of their "deemed" transfer, with ten per cent. per annum added until the same is paid. Let us see what this means. Who is to pay this sum, and out of what?

In the case at bar, the estates transferred are a legal estate to A. for life of B., but not beyond the date when B. attains a specified age, with remainder to C. The statute fixes the amount to be paid as a "tax" or "charge" upon the transfer to A. of his life estate. Assume this to be paid. There is no second tax or charge upon such transfer, and B. is entitled to the full enjoyment of his estate without further payment for its transfer to him.

But at this point the statute says either a further payment must be made out of the principal which sup-

ports his estate in order to satisfy the "charge" or "tax" upon the transfer of the estate in remainder to C., or the amount of such "charge" or "tax" shall roll up with interest and penalty against such remainder. We submit that either alternative conflicts with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law and denies to such citizens the equal protection of the laws.

If the State enforces the first alternative, A. is made a forced contributor to the payment of the "tax" or "charge" upon the transfer to C. During the whole period of his life estate he is deprived of the income which the amount of his tax would produce. It seems plain that for a State to compel one person to pay from his estate a tax, or even a small part of a tax, properly chargeable against another, is not only manifest injustice in itself, but is directly contrary to the commands of the Fourteenth Amendment to the Constitution of the United States.

But suppose the State adopts the other alternative and postpones the collection of the "tax" or "charge" until the actual possession and enjoyment begin of the *corpus* of the remainder. Let us see how this method will operate. Let a testator bequeath a legal estate to A. for life with remainder to B., a nephew. A. lives twenty-five years, then dies, B. surviving him. B., the nephew, must now pay for the privilege of inheriting the property 250 per cent. of the original charge, *i. e.*, three and one-half times five per cent. (or 17½ per cent.) of the value of the remainder when A. entered upon the life estate. Nor is it at all improbable that 17½ per cent. of that value may be fully 50 per cent. or more of the actual value when B. enters into possession and has any property out of which to pay the tax.

Suppose in the case just cited that during A.'s life B. dies leaving a cousin as sole heir, and the cousin dies leaving a nephew as legatee, A. then dying. The State has a choice, under the first alternative, of muleting the

value of A.'s life estate each time the personality of the remainderman changes in an amount determined by the degree of consanguinity between the successive remaindermen; or

Under the second alternative, of waiting till A. dies and the final remainderman enters into possession and then taking out of the *corpus* the total of the successive transfer charges with accumulations of interest and penalties, which may easily exceed the whole remainder and will certainly confiscate the greater portion of it, and in any event compels the final remainderman to contribute toward the tax, or charge upon the transfers of the preceding remaindermen.

It surely does not need argument that these provisions of the statute, are intolerably arbitrary and discriminating.

The remedy is simple. The charge or tax levied by the State upon a transfer of estates in remainder should be made payable *without interest or penalty* when the remainderman enters upon the possession and enjoyment of the *corpus* of his remainder. Such a course is entirely within the State's power. The features we are discussing of the present statute are repugnant to every principle of justice.

Nor is their arbitrary, unjust and discriminatory character, nor the difficulty of enforcing them, relieved, if the course suggested in the judgment below by the learned counsel for the defendants in error be adopted, and the remainder be sold to satisfy the charge or tax. Consider what an estate in remainder really is. When a testator bequeathes an estate to A. for life, with remainder to B., what is it that B gets? Not the *corpus* which supports A.'s life estate, but the right to have and enjoy that *corpus* if he outlives A., the present right to the enjoyment of something in the future, a mere expectancy, which may never ripen into realization. The executors of the testator have no control over this expectancy; they cannot dispose of it nor any portion of it. We doubt whether any court or statute could clothe them with power to do so; they have neither the title to, interest in, nor possession of, the estate in remainder.

To make them personally liable would be to compel them, out of their own pockets, to pay a stranger's tax. But the learned counsel suggests that the remainderman who is the owner of it, but may never, and frequently does not, realize anything out of it, shall raise funds outside to pay the "tax" or "charge," or shall pledge or sell his expectancy. This is to make one pay a tax on account of something he may never get, and to change the character of the tax from a tax *in rem* to a tax *in personam;* and to compel one to pay a tax because he may possibly at some future day enjoy the use of property is clearly an arbitrary abuse, which is forbidden by the Fourteenth Amendment of the Constitution of the United States.

POINT IV.

Whether the Power of Appointment Amendment be construed as imposing a tax or making a charge for a privilege, it arbitrarily creates a particular class of property owners, and discriminates against this class for the sole reason that in the chain of title to their property there is a power of appointment (exercised or unexercised).

It is still the settled law of New York that at the death of David Dows, Sr., in 1890, there was an actual transfer to his grandchildren, and it is admitted that all of the then requirements of the Transfer Tax Law were fulfilled.

It is also the settled law of New York that all property which was real estate at the time of the transfer continues, as to the lineal descendants of the transferor, to be real estate though such descendants may not enter into possession and enjoyment of the property until

years after the transfer and the character of the property has in the meantime been converted into cash or securities. (*Matter of Sutton*, 3 App. Div., 208, affirmed 149 N. Y., 618), and is therefore exempt from a transfer tax.

> "When the property or any beneficial interest "therein passes by any such transfer (to lineal "descendants) such transfer of property shall not "be taxable under this Act unless it is personal "property." (Tax Law, Section 221.)

The decision of the Court below holds that lineal descendants of a testator who puts a power of appointment in his will cannot have the benefit of this exemption, if, in the period between the actual transfer of the property from the testator and the subsequent "deemed" or imaginary transfer under Section 220, Subdivision 5, the real estate devised to them by the testator has been converted into personal property; that is to say, the recipients of property mentioned in a power of appointment, whether exercised or not, are put in a class by themselves and are deprived of an exemption open to all other lineal descendants from the owner of the property, the real transferor.

This applies equally to descendants of testators dying before and of those dying after the enactment of the Power of Appointment Amendment of 1897 (fol. 84). In the case at bar, all the property covered by the Sixth Division of David Dows, Sr.'s will, and a large part of the property covered by the Eighth Division of the will, were real estate at the time of his death. The aggregate value of the real estate which David Dows, Sr., bequeathed at his death to his grandchildren exceeded two millions of dollars (fols. 47-8, 64). Subsequent to his death and prior to the entering upon and actual possession and enjoyment of the property by the grandchildren, this real estate was sold and the proceeds invested in personal property (fols. 26-7). The Court of Appeals holds that the grandchildren of David Dows may not have the benefit of the general exemption provided in Section 221, but that, unlike other owners by devise of real property, inas-

much as their grandfather put a power of appointment in his will, a tax must be paid for the privilege of entering upon the enjoyment of the real estate devised by him to them (fol. 84).

This is discrimination, not classification, and is contrary to the Fourteenth Amendment of the Constitution of the United States.

POINT V.

The Power of Appointment Amendment imposes a discriminating and arbitrary tax upon property owners in whose chain of title is a power of appointment, exercised or unexercised, in that it taxes in this case, stocks in incorporated companies liable to taxation upon their capital, tax exempt bonds of the State of New York, and tax exempt stock of the City of New York.

The Tax Law, Article I, Section 4, Subdivision 16, exempts all other property owners from taxation upon stocks in incorporated companies liable to taxation upon their capital (Cumming's & Gilbert's New York Annotated Tax Laws, 2nd Ed., p. 76). In the property taxed in the case at bar there are included such stocks of the appraised value of $1,852,403.47 (fols. 48, 64-5). This is a direct discrimination against the legatees in the case at bar as compared with other tax payers in the State of New York, not one of whom is taxed upon such property. The injustice of the discrimination is enforced by the fact that the amendment to Article X (the Transfer Tax Law) of the Tax Law, passed in 1900 (Laws of 1900, Chap. 382, page *supra*) is a legislative declaration that prior to such amendment the

general exemptions contained in Article I, Section 4, applied to all transferees under Article X (*Matter of Harbeck*, 161 N. Y., 215; *Matter of Miller*, 110 N. Y., 216).

2. For the same reasons the following property is taxed in the case at the bar in violation of the Fourteenth Amendment of the United States Constitution:

(1) 50 State of New York Canal Improvement Bonds, issued Sept. 4, 1897, pursuant to Chap. 79, Laws of 1895; appraised at $51,635 (fols. 48-9, 65), which are exempt by Article I, Section 4, Subdivision 6, of the Tax Law as amended by Chap. 80, Laws of 1897;

(2) 100 shares Consolidated Stock of the City of New York, issued Nov. 12, 1896, for the redemption of bonds and stock of the City of New York maturing that year; appraised at $109,380 (fols. 48-9, 65), which are exempt by the same Subdivision 6 of Section 4 of the Tax Law, and are also exempt under Sec. 7 of the General Municipal Law, Chap. 685 of the Laws of 1892.

All these exemptions are general exemptions applicable to all owners of property in New York. To exclude the legatees under the will of David Dows, Sr., from the benefit of these exemptions is arbitrary and discriminating and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The said Canal Improvement Bonds and New York City Stock are also non-taxable for the further reason that Section 10 of Article I of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

FINAL POINT.

For the foregoing reasons the decision of the Court below is erroneous; Subdivision 5 of Section 220 of the

Tax Law of the State of New York, and the whole thereof, and Article X of said Tax Law, in so far as it enforces a tax or charge upon the transfer of remainders before the remaindermen enter upon the actual possession and enjoyment of the *corpus* of their estates in remainder, should be declared in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The judgment and decree below should be reversed and the cause remanded with the usual directions to the Court below.

Washington, October Term, 1901.

HORACE E. DEMING,
JULIUS HENRY COHEN,
Of Counsel for Plaintiff in Error.

APPENDIX.

The law as to the taxation of inheritances in 1890, at the death of David Dows, Senior, was Chapter 483 of the Laws of 1885, as amended by Chapter 713 of the Laws of 1887. The Act was entitled "An Act to Tax Gifts, Legacies and Collateral Inheritances in certain cases." In 1890 there was no tax upon the inheritances of lineal descendants. Section 1 of the Act read as follows:

"After the passage of this act all property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State, or any interest therein, or income therefrom which shall be transferred by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to anybody politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent, and any lineal descendant of such decedent born in lawful wedlock, or the societies, corporations and institutions now exempted by law from taxation by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property, and at and after the same rate for any less amount, to be paid

to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, for the use of the State, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed, provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." (Chap. 483, L. 1885, am'd by Chap. 713, L. 1887.)

By Chapter 908, Laws of 1896, this law was incorporated, under the title "Taxable Transfers," as Article X of Chapter Twenty-four (The "Tax Law") of the General Laws of the State of New York.

Article X consists of Sections 220 to 242, both inclusive, of the Tax Law. Sections 220, 221, 222, 223, 224 and 242 are the ones with which we are concerned. These sections, on January 13th, 1899, the date of the death of the donee of the power of appointment in David Dows, Sr.'s, will, read as follows:

Section 220. "*Taxable Transfers.*—A tax shall be and is hereby imposed upon the transfer of any property, real or personal of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state and the decedent was a non-resident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. (Such tax shall be imposed) When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof of any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power taking effect at the time of such omission or failure.

6. The tax imposed thereby shall be at the rate of five per centum upon the clear market value of such property except as otherwise prescribed in the next section." (Chap. 908, L. 1896, am'd by Chap. 284, L. 1897.)

Section 221. *"Exceptions and Limitations.*— When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this State, of the decedent, grantor, donor or vendor, or to any child, to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years

thereafter, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation shall be exempted from and not subject to the provisions of this act." (Chap. 908, L. 1896; am'd by Chap. 88, L. 1898.)

Section 222. "*Lien of tax and payment thereof.*—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer or the comptroller of the county of the Surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator or trustees shall take duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act, unless he shall produce a receipt so sealed and countersigned by the state comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this Chapter. All taxes imposed by this article shall be due and payable at the time of the transfer except as hereinafter provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained

at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." (Chap. 908, L. 1896; am'd by Chap. 284, L. 1897.)

Section 223. "*Discount, interest and penalty.*—If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reasons of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section two hundred and twenty-six of this chapter, interest shall be charged at the rate of six per centum from the accrual of the tax until the date of payment thereof."

Section 224. "*Collection of tax by executors, administrators and trustees.*—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If

any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor, or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

Section 242. "*Definitions.*—The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this State. The word 'transfer,' as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words 'county treasurer,' 'comptroller,' and 'district attorney,' as used in this article, shall be taken to mean the treasurer, comptroller or district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-nine of this article." (Chap. 908, L. 1896, am'd by Chap. 88, L. 1898.)

The following sections of the Tax Law are also referred to on the argument:

Section 4. "*Exemptions from Taxation.*—The following property shall be exempt from taxation:

6. Bonds of this state to be hereafter issued by the comptroller to carry out the provisions of chapter seventy-nine of the laws of eighteen hundred and ninety-five, and bonds of a municipal corporation heretofore issued for the purpose of paying up or retiring the bonded indebtedness of such corporation. (Thus amended by L. 1897, Chap. 80.)

16. The owner or holder of stock in an incorporated company liable to taxation on its capital, shall not be taxed as an individual for such stock."

Also the following section from the General Municipal Law:

Section 7. "*Funding of Bonded Debts.*—The bonded indebtedness of a municipal corporation, including interest due or unpaid, may be paid up or retired by the issue of new substituted bonds for like amounts by the board, council or officers having in charge the payment of such bonds. Such new bonds shall only be issued when the existing bonds can be retired by the substitution of the new bonds therefor, or can be paid up by money realized by the sale of such new bonds. Where such bonded indebtedness shall become due within two years from the issue of such new bonds, such new bonds may be issued and sold to provide money in advance to pay up such existing bonds, when they shall become due. Such new bonds shall contain a recital that they are issued pursuant to this section, which recital shall be conclusive evidence of their validity and of the regularity of the issue; shall be made payable not less than one nor more than thirty years from their date; shall bear date and draw interest from the date of the payment of the existing bonds, or the receipt of the money to pay the same, at not exceeding the rate of four per cent. per annum, payable quarterly or semi-annually; and an amount equal to not less than two

per cent. of the whole amount of such new bonds shall be payable each year after the issue thereof. Such new bonds shall be sold and negotiated at the best price obtainable, not less than their par value; shall be valid and binding on the municipal corporation issuing them; and until payable shall be exempt from taxation for town, county, municipal or state purposes. All bonds and coupons retired or paid shall be immediately canceled. A certificate shall be issued by the officer, board or body issuing such new bonds stating the amount of existing bonds, and of the new bonds so issued, which shall be forthwith filed in the office of the county clerk." (Chap. 688, L. 1892.)

Office Supreme Court U.S.
FILED
NOV 25 1901
JAMES H. McKENNEY,

In the Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 351.

ALEXANDER E. ORR, and Others, as Executors and Trustees of the Last Will and Testament of DAVID DOWS, Senior, Deceased, *et al*,

Plaintiffs in Error,

vs.

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,

Defendants in Error.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, IN THE STATE OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

JABISH HOLMES, Jr.,
EDGAR J. LEVEY,
of Counsel

LIVINGSTON MIDDLEDITCH CO., 45 PARK ST., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

ALEXANDER E. ORR & Others, as Executors and Trustees of the Will of DAVID DOWS, SENIOR, and Others,
Plaintiffs in Error,

AGAINST

THEODORE P. GILMAN, Comptroller of the State of New York, and BIRD S. COLER, Comptroller of the City of New York,
Defendants in Error.

No. 351.

Brief for Defendants in Error.

The question presented is whether that portion of Chapter 284 of the Laws of 1897 of the State of New York, amending the Transfer Tax Law, by imposing a tax upon the succession created *by the exercise of a power of appointment*, violates the 14th Amendment. The constitutionality of the Law has been sustained by the Court of Appeals of New York, in the *Matter of Vanderbilt*, 163 N. Y., 597, affirming 50 App. Div., 246, on the opinion below (see opinion in Record, pp. 38-42); also in the second appeal in *Matter of Vanderbilt*, without opinion, 166 N. Y., 640, as well as on the appeal in this Case as Matter of Dows, 167 N. Y., 227, (see opinion in Record, pp. 44-48).

Statement.

DAVID DOWS, SENIOR, died March 30th, 1890, leaving a Will, which was admitted to Probate in New York County on April 14th, 1890 (Record, p. 2). The question arises under the Sixth and Eighth Clauses of the Will, which are printed in full in the Record, (Sixth Clause, Record, p. 5, fol. 8; Eighth Clause, Record, p. 8, fol. 14), and which Clauses are the same, so far as the question at issue is concerned.

By the Sixth Clause, David Dows, Senior, devised his interest in the Columbia and Dows stores, in Brooklyn, to his executors and their survivors, &c., the will providing,

> "I hereby direct that the title to the same shall, from and after my decease, *be vested* in my said Executors (or such of them as may qualify) and the survivors of them and their successors in trust,"

to collect the rents, &c., and to pay the income to his son David Dows, Jr., during his lifetime. The will then provided,

> "And *upon the death* of my said son the said property with all accumulations of interest, income and profits *shall vest* absolutely and at once, in such of his children him surviving and the issue of his deceased children, as he may, by his last will and testament, designate and appoint, and in such manner and upon such terms as he may legally impose" (Record, p. 5, fol. 8).

David Dows, Jr., exercised this power of appointment by his will in favor of his sons as hereinafter stated, and then for the first time the property *vested* in these children. The will is carefully drawn and under it, during the life of David, Jr., it expressly provides that the Executors as Trustees hold the legal title, and the children's legal title does *not vest* until David, Jr's, death and the exercise of the power by him.

The will of David Dows, Senior, further provides that in case David, Jr., dies intestate, or in other words, fails to exercise the power of appointment, *then on the*

death of David Dows, Jr., the property *shall vest* in his children in certain proportions and upon certain conditions (Record, p. 5, fol. 9).

These provisions are immaterial, because they did not take effect, as David, Jr., exercised the power, and the question of the right to tax *arises under the exercise of the power,* and, what the right to tax under the failure to exercise the power might be, is immaterial. Nevertheless, it should be noted that under the will of David Dows, Senior, *even in case of a failure to exercise the power, the property did not vest in the grandchildren until the death of their father,* the will expressly providing that, during the trust estate, the legal title should vest in the trustees and the legal title should not vest in the grand-children, until their father's death.

In the Eighth Clause of the Will of David Dows, Senior, (Record, p. 18) the same language is used as in the Sixth Clause above quoted. It vests in his Executors as Trustees one-eighth of the residuary estate in trust to pay the income to David Dows, Jr., and gives his son the same power of appointment as is given by the Sixth Clause.

Under the Will of David Dows, Senior, the Executors and Trustees were authorized in their discretion to sell the Dows and Columbia Stores mentioned in the Sixth Clause (Record, p. 6, fol. 10), and any of the testator's residuary real estate (Record, p. 8, fol. 13; p. 10, fol. 16).

During the life estate of David, Jr., and while the Dows and Columbia Stores and the residuary Real Estate was vested in the Executors and Trustees under the terms of the Will, they sold the stores and a large part of the residuary real estate, and invested the proceeds in personal property, under the powers contained in the Will of David Dows, Senior, so that on the death of David Dows, Jr., in 1899, all the property held by the Trustees affected by the proceedings, and over which David, Jr., had a power of appointment by the terms of his father's will, was all personal property.

David Dows, Jr., died January 13th, 1899, leaving

a will admitted to probate by the Surrogate of Westchester County, (Record, p. 2, fol. 3). By the Third Paragraph David Dows, Jr., exercised the power of appointment granted him by his father's will (Record, pp. 11-13). By this Paragraph David Dows, Jr., after reciting that by the Sixth and Eighth paragraphs of his father's will,

> "I am given the power to designate and appoint by will from among my children and their issue, the persons in whom certain property or the proceeds of certain property described in said Sixth and Eighth paragraphs *shall vest at my death,* now in pursuance and exercise of such powers I do hereby appoint, designate and direct as follows: The said property subject to my appointment and the whole thereof shall *vest upon my death* in my three children, David, Robert and Kenneth, in the following manner, viz. (Record, p. 11, fol. 19):"

To each of his sons he gave each the income of 3/48 thereof until Robert died or became twenty-one years of age, (Record p. 12, clauses (a), (d) and (g)); to each he also gave the income of 4/48 thereof, until Robert died or became 25 years of age (Record 12, clauses (b), (e) and (h)); to each he also gave the income of 9/48 thereof, until Robert died, or became 30 years of age (Record, p. 12, clauses (c), (f) and (i).) Thus each son was given the income of $\frac{1}{3}$ of the property. On the termination of these life estates, either by the death of Robert, or his attaining the age of 21, 25 or 30 (whichever event shall sooner happen) David Dows, Jr., gave the principal as follows: the portion of the estate of which David had the income went absolutely to Robert (Record, p. 12, clauses (a), (b) and (c);) the portion of which Robert had the income went absolutely to Kenneth, (Record, p. 12, clauses (d), (e) and (f);) the portion of which Kenneth had the income went absolutely to David, (Record, p. 12, clauses (g), (h) and (i). Thus the effect of the will of David Dows, Jr., was to give to each son a life estate *pur autre vie* in $\frac{1}{3}$ of the property, and a vested remainder in one-third of the principal, the income

of which one-third one of his brothers had enjoyed during the trusts. That there might be no doubt of the intention of David Dows, Jr., to give each son a vested remainder, he so states in his will.

> "It is my meaning that each of my said three sons shall take an estate *pur autre vie* in one equal share of all the property over which my said father's will gives me the power of appointment, such life estate to be measured by the life of my son Robert, or if he is dead, by that of my son Kenneth, with the possibility of such life estate being shortened, as to specified portions thereof, by Robert's or Kenneth's (as the case may be) reaching certain specified ages; and that each child, shall take also a remainder in another equal share, to take effect in possession at the close of his life estate in the other share; *but that each interest for life or remainder shall vest absolutely and at once upon my death, in legal and not equitable ownership, and without contingency*" (Record, p 13, fol. 21).

Under this will of David Dows, Jr., the property on the death of David, Jr., vested in his children in a different way than if the power had not been exercised. Under the will of David Dows, Senior, if the power had not been exercised, the property would have vested on the death of David, Jr., in 1899, in each of his three sons equally, as follows; as each grandson became 21 years of age he would have received $50,000, under the Sixth clause (Record, p. 6), and the same amount under the Eighth Clause (Record, p. 9); as each became 25 a further sum not exceeding $100,000 under the Sixth Clause (Record, p. 6), and the same amount under the Eighth Clause (Record, 9); as each became 30 years, the remainder under the Sixth Clause (Record, p. 6), and also the remainder under the Eighth Clause (Record, p. 9). After becoming 21 years of age, each child was to receive the entire income of his share under the Sixth Clause (p. 6), and the entire income of his share under the Eighth Clause (Record, p. 9). During minority each child could receive none of the income under the Sixth Clause, and only such sums, not exceeding $5,000 per year as in the judgment and

discretion of his guardian might seem proper for the maintenance, education and support of such child (Record, p. 9).

On the death of David Dows, Senior, in 1890, no tax was imposed by the Transfer Tax Law upon a bequest or devise to a child or grand-child, but before the death of David Dows, Jr., in 1899, and the exercise of the power of appointment by him, a tax of 1% had been imposed upon bequests of personal property to a child or grand-child, but no tax had been imposed upon a devise of Real Estate to such persons.

Prior to the death of David Dows, Junior, in 1899, the Legislature, by Chapter 284 of the Laws of 1897, amended Section 220 of the Taxable Transfer Law, by adding thereto a new subdivision, known as subdivision 5, which provided:

> §5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such ommissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

The constitutional validity of that portion of the above act imposing a tax on the succession created by exercise of a power of appointment, is the only question involved, as David Dows, Jr., exercised the power of appointment and the tax has been imposed upon the

succession thus created. As before pointed out, his children received different interest than if he had failed to exercise the power, and in the latter case the tax would have been different and different questions would have arisen which are not now before the Court.

The usual proceedings were taken under the Transfer Tax Act for ascertaining the value of the estate and the tax thereon. An appraiser was appointed (Record, p. 13), and he made his report as provided by Sec. 231 of the Transfer Tax Law, appraising the property, and ascertaining the value of the taxable interest. The appraiser gave notice of the appraisal to all parties interested, including the plaintiffs in error (Record, p. 14, fol. 24), and they appeared by Attorney (Record, p. 16, fol. 27) and filed objections to the proceedings which were overruled (Record, 16, paragraph Eighth).

Upon this order the Surrogate entered an order assessing a tax of 1% upon the valuations reported by the appraisers (Record, p. 25). The plaintiffs in error appealed from the order through the various Courts to the Court of Appeals, where the order, being affirmed, this writ of error is taken.

The assignments of errors are as follows:

First.—The Court of Appeals decided that the amendment of 1897 imposed a tax upon the succession created by the exercise of the power of appointment and the First assignment of error is that this construction violates the 14th amendment.

Second.—The Court of Appeals decided that children of David Dows, Jr., received vested remainders under their father's will on January 13th, 1897, and that the remainder being vested, the time of payment was controlled by the provisions of Section 222, that *"all taxes imposed by this article shall be due and payable at the time of the transfer,"* and not by the provision of Section 222 that *"taxes upon the transfer of any property or interest therein limited, conditioned, dependent or determinable upon the the happening of any contingent or future event by reason of which the fair market value thereof cannot be ascertained at the*

time of the transfer as herein provided shall accrue and become due and payable when the person beneficially entitled thereto shall come into actual possession or enjoyment thereof." The fourth assignment of error is that this construction violates the 14th Amendment, and this claim was raised before the Surrogate.

THIRD.—The Court of Appeals held that the character of the Trust Fund, whether Real or Personal Property, at the time of the exercise of the power of appointment by David Dows, Jr., 1899, determined its taxability and not its character in 1890, the death of David Dows, Senior. The Third Assignment of Error is that as Real Estate passing to lineal decendants is exempt, and as a large portion of the property was Real Estate, on the death of David Dows, Senior, in 1890, it must still be treated as Real Estate on the death of David Dows, Jr., in 1899, when he exercised the power, although it was actually personal property at that time, and that because the Court of Appeals did not so hold, the 14th Amendment was violated. No violation of the 14th Amendment was claimed on this point in the Court below and in the assignment of errors the claim was first made.

FOURTH.—The Court of Appeals held that as the tax was on the succession, certain stocks and bonds of corporations which were exempt from general taxation, could be appraised to determine the value of the succession. The Third Assignment of Errors claims this construction violates the 14th Amendment, but, although the claim that they should not be included was raised in the Courts below (Record, p. 22, Paragraph IV), it was not until the assignments of errors that the constitutional question was raised.

It was also claimed by the Third Assignment of Errors that certain Bonds were exempt from taxation, and that the act in question imposes a tax upon property and violates the obligation of a contract, and thus violates Section 10 of Article 1 of the U. S. Constitution (Record, p. 54, fol. 98). This constitutional claim

was raised before the Surrogate. The bonds have not been taxed, but appraised in determining the value of the succession.

POINTS.

I.

The decision of the Court of Appeals construing the act as imposing a tax on succession is binding on this Court.

(a) The Court of Appeals has construed this power of Appointment amendment as imposing a tax on succession at the time it vests in actual possession and not on property.

Matter of Vanderbilt, 163 N. Y., 597, affirming 50 App. Div., 246, on opinion below (Opinion in Record, pp. 38-42).
Matter of Dows, 167 N. Y., 227. (See opinion in Record, pp. 44-48.)

These opinions are exhaustive statements of the reasons of the Court and are not quoted from because printed in the Record. This construction of the law, and that it violates no provision of the New York Constitution, and, so far as that Constitution is concerned, deprives no person of a vested right is conclusive on this Court.

A large portion of Plaintiff's Brief is devoted to an attempt to prove that the statute imposes a tax on property and not on succession. That question, being one of construction of the act, is not open to argument in this Court.

(b) The decisions of a State Court upon the construction of its own Statute are final, and are adopted

by this Court, without regard to this Court's opinion upon its correctness.

The Gulf and Ship Island Railroad Company v. *Hewes, tax collector, etc.*, decided November 18, 1901, by this Court.

Commercial Bank v. ***Chambers,*** 182 U. S., 556.

First National Bank v. ***Ayers,*** 160 U. S., 660.

Aberdeen Bank v. ***Chehatis Co.,*** 166 U. S., 440.

People v. ***Weaver,*** 100 U. S., 539.

McElvane v. *Bush,* 142 U. S., 155.

Wood v. *Brady,* 150 U. S., 18.

State Railroad Tax Cases, 92 U. S., at page 617.

Bell Gap Ry. Company v. *Pennsylvania,* 134 U. S., 232.

In *Columbus Southern Railway,* v. *Wright,* 151 U. S., at page 475, the Court says:

> "Upon this writ of error we cannot of course review the construction which the Supreme Court has placed upon its own constitution and the law in question."

In *Pittsburgh, &c., Ry. Company* v. *Backus,* 154 U. S., at page 425, the Court says:

> "The decision of the Supreme Court of the State removes from this case, all question of conflict between the act and the constitution of the State, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights, which the Federal Constitution secures to the plaintiff."

In *Commercial Bank* v. *Chambers,* 182 U. S., 556, Justice White says: *"This construction of the Statute by the State Court is binding on this Court."*

> In the *First National Bank* v. *Ayers,* 160 U. S., 660, this Court held itself bound by the construction of the State Court that the definition of

"credit" in the Tax Act did not include shares of stock in banks, and that the owner could not deduct debts. The Court then discussed the question whether the act as thus construed violated the Federal Constitution.

In *McElvane* v. *Bush*, 142 U. S., at page Chief Justice Fuller says:

> "This Court follows the adjudication of the highest courts of a State in the construction of the statutes of that State."

Many more cases could be cited, and the above quotations are only made in view of the fact that so much of the Appellant's Brief is devoted to an attempt to prove, and to have this Court hold, that the tax in question is on property, which is in direct contradiction to the construction put upon this amendment by the Court of Appeals in the *Vanderbilt Case* and in this case, where they expressly hold the tax is not on property, but on the succession. Their construction must be adopted by the Court on this Appeal under all of the authorities.

The construction adopted by the Court of Appeals is in harmony with all of its previous decisions, which hold the tax to be one on succession and not on property.

Matter of Hoffman, 143 N. Y., 329.
Matter of Swift, 137 N. Y., 88.

Matter of Harbeck, 161 N. Y., 218.
Matter of Bronson, 150 N. Y., 6.
Matter of Merriam, 141 N. Y., 484.

In the *Matter of Harbeck*, 161 N. Y., at page 218, the Court says "the tax is not on property but on the right of succession."

In *Forsyth* v. *Hammond*, 166 U. S., at p. 518, Mr. Justice Brewer says:

> "The construction by the Courts of a State of its constitution and statutes, is as a general rule,

> binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That Court is the final arbiter as to such questions." (Citing many cases.)

In *Leffingwell* v. *Warren*, 2 Black., 599, 603, Justice Swayne says, at p. 603:

> "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute and is as binding upon the Courts of the United States as the text."

In the *Matter of Swift*, 137 N. Y., at page 88, the Court held the tax was on "the right of succession."

In the *Matter of Hoffman*, 143 N. Y., 327, the Court says "the tax is one upon the right of succession, levied upon the successors in respect to the shares to which they succeeded and not upon decedent's estate as such."

In the *Matter of Bronson*, 150 N. Y., at page 6, Judge Gray says, "The Inheritance Tax Act, or as it is known to-day, the Transfer Tax Act, imposes a tax upon the right of succession."

In *Matter of Merriam*, 141 N. Y., at page 484, Judge Bartlett says, "this tax is not imposed on property, but on the right of succession under a Will."

In the *Matter of Davis*, 149 N. Y., at page 546, the Court says, "it has often been held by this Court that the tax imposed is not a tax upon property, but upon the right of succession."

In *Matter of Knoedler*, 140 N. Y., at page 380, the Court says, "it taxes the right of succession to property and measures the tax in the method specifically prescribed (non taxable property can be included").

The same construction that the tax is on succession and not on property has been adopted by this Court.

Plummer v. *Coler,* 178 U. S., 115.
Murdock v. *Ward,* 178 U. S., 139.
Knowlton v. *Moore,* 178 U. S., 41.
United States v. *Perkins,* 163 U. S., 625.

In *Magoun* v. *Ill. Trust & Savings Bank,* 170 U. S., 283, this Court says, "an inheritance tax is not one on property but one on succession."

(*c*) The tax in this Case being on the succession as decided by the Court of Appeals, the question before this Court is not whether that construction is right, but whether the act as thus construed violates the 14th Amendment, as claimed by the plaintiffs in error. It is submitted it does not.

II.

The Fourteenth Amendment does not give this Court power to review an Act simply because the Appellants regards it as harsh.

A large portion of the Brief of the Plaintiffs in error attacks the law, because it is claimed to be harsh and unjust. It is, however, a fair law, as will be shown hereafter, and subjects to taxation successions, which through a fiction of relation, were escaping taxation. But even if it were as harsh as appellants claim, still that fact would not give the Court jurisdiction.

In *County of Mobile* v. *Kimball,* 102 U. S., 703, in speaking of taxation, this Court says:

> "But this Court is not the harbor in which the people of the city or county may find a refuge from ill-advised, unequal and oppressive State legislation. The judicial powers of the Federal Government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded. In all other cases, the

only remedy for the evil complained of rests with the people and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation so far as that is practicable and be more mindful than their predecessors of the public interests."

In *King* v. *Mullins*, 171 U. S., at page 436, Mr. Justice Harlan says:

> "The judiciary should be very reluctant to interfere with the taxing system of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property."

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., in speaking of an inheritance tax law, after citing many cases on equality of taxation, Mr. Justice McKenna says, on page 293:

> "With these for illustrations it may be safely
> "said that the rule prescribes no rigid equality
> "and permits to the discretion and wisdom of the
> "State a wide latitude as far as interference by
> "this Court is concerned. Nor, with the im-
> "policy of a law, has it concern. Mr. Justice
> "Field said, in Mobile County *v.* Kimball, 102 U.
> "S., 691 that this Court is not a harbor in which
> "can be found refuge from ill-advised, unequal
> "and oppressive State legislation. And he ob-
> "served in another case: 'It is hardly necessary
> "'to say that hardship, impolicy or injustice of
> "'State laws is not necessarily an objection to
> "'their constitutional validity.'"

In the *Sinking Fund Cases*, 99 U. S., 700, Chief Justice Waite said:

> "Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a *rational* doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

III.

In taxation "due process of law" is not violated, if the act provides for notice and an opportunity to object.

The Act before the Court amends the General Transfer Law, which act provides in Section 231 for notice to all parties interested. The Record shows all parties had notice; that they appeared and have contested the matter through all the Courts. They have not been deprived of property without "due process of law," and must base their claim on some other provision of the Amendment.

Winona, &c., v. *Minnesota*, 159 U. S., at page 537 and cases cited.
Palmer v. *McMahon*, 133 U. S., at page 669.
Simons v. *Croft*, 182 U. S., 427.
Davidson v. *New Orleans*, 96 U. S., 97.

IV.

The act does not abridge the privileges or immunities of citizens of the United States.

This provision of the amendment has no relation to taxation, but relates only to rights conferred by the national government.

Giozza v. *Tiernan*, 148 U. S., 657.
Bartmeyer v. *Iowa*, 18 Wall, 120.

In the first case, Chief Justice Fuller says, at page 661:

"The privileges and immunities of citizens of "the United States are privileges and immuni- "ties arising out of the nature and essential char-

"acter of the National Government, and granted
"or secured by the Constitution of the United
"States, and the right to sell intoxicating liquors
"is not one of the rights growing out of such citi-
"zenship. Bartemeyer *v.* Iowa, 18 Wall., 129."

V.

"Equal protection of the laws," does not prohibit classification for taxation, provided the classification is reasonable, and all within the same class are treated the same under like circumstances.

The whole subject of "equal protection of the laws" has been so recently examined by this Court in reference to Inheritance Taxes, that an extended reference to authorities is unnecessary.

In *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S., 283, Mr. Justice McKenna says:

> "What satisfies this equality has not been and
> "probably never can be precisely defined. Gen-
> "erally it has been said that it 'only requires the
> "same means and methods to be applied impar-
> "tially to all the constituents of a class so that
> "the law shall operate equally and uniformly
> "upon all persons in similar circumstances.'
> "Kentucky Railroad Tax Cases, 115 U. S., 321,
> "337. It does not prohibit legislation which is
> "limited, either in the objects to which it is di-
> "rected or by the territory within which it is to
> "operate. It merely requires that all persons
> "subjected to such legislation shall be treated alike
> "under like circumstances and conditions, both
> "in the privilege conferred and the liabilities im-
> "posed." * * * "The rule, therefore, is
> "not a substitute for municipal law; it only pre-
> "scribes that that law have the attribute of
> "equality of operation, and equality of operation,

"does not mean indiscriminate operation on per-
"sons merely as such, but on persons according
"to their relations." * * *

After reviewing many cases, the Justice says:

"Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the Bell's Gap Railroad *v.* Pennsylvania, 134 U. S., 232, and Mr. Chief Justice Fuller in Giozza *v.* Tiernan, 148 U. S., 657, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley as follows: 'It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State framing their constitution."

"And so Mr. Justice Miller, speaking for the Court in Davidson *v.* New Orleans, 96 U. S., 97, 105, said: 'The Federal Constitution imposes no restraints on the State in regard to unequal taxation.'

"The Court, through Mr. Justice Lamar, in Pacific Express Co. *v.* Seibert, 142 U. S., 339, was equally emphatic. He said, on page 351: 'This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens."

> "And it was said in Merchant's Bank *v.* Pennsylvania, 167 U. S.: 'Indeed, the whole argument of a right under the Federal Constitution, to a challenge of the tax law on the ground of inequality in the burden resulting from the operation of the law is put at rest by the decision in Bell's Gap Railroad v. Pennsylvania.'
>
> "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so."

In *Giozza* v. *Tiernan*, 148 U. S., 657, Mr. Chief Justice Fuller, speaking for this Court, sums up the whole subject of "equal protection of the law" as follows:

> "Nor in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. *It is enough that there is no discrimination in favor of one as against the other of the same class.* Bell's Gap Railroad *v.* Pennsylvania, 134 U. S., 232; Home Insurance Co. *v.* New York, 134 U. S., 594; Pacific Express Co. *v.* Seibert, 142 U. S., 339.

VI.

The object and effect intended to be accomplished by the addition to the Taxable Transfer Law of the Power of Appointment Amendment and that it in no way violates the Fourteenth Amendment.

(*a*) It is conceded that the succession taxed falls within the direct provisions of the amendment, which is as follows:

> "*Taxable Transfers.* A tax shall be and is hereby imposed upon the transfer of any property

to persons not exempt by law from taxation on real or personal property, in the following cases:

"1. When the transfer is by will from any person dying seized or possessed of the property while a resident of the State.

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made *either before or after the passage of this act*, such appointment *when made* shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

By Section 221 the rate is 1% where the transfer is to a child or lineal descendant of a decedent.

David Dows, Jr., exercised, after this act was passed, a power of appointment derived from the disposition of property made before the passage of the act (viz., derived from the will of David Dows, Sr.). The case, therefore, falls within the direct provisions of the Act, which then provides that the effect of such appointment shall be deemed a transfer taxable under the provisions of this Act in the same manner as though the trust fund to which such appointment relates belonged absolutely to David Dows, Jr., and had been bequeathed by him by will. The Act places the succession to the trust fund, so far as the tax is concerned, upon the same footing as though it had belonged absolutely to David, Jr., and had been bequeathed as his property by his will. Had David, Jr., been the absolute owner of the trust fund and bequeathed it by his will to his children, would the transmission of this property be taxable? That it would be, is not open to question. This Act places the property passing under the exercise by David, Jr., of the power of appointment upon the same footing as though the property belonged absolutely to him. It certainly cannot be doubted that it was the intent of the Legislature to subject to taxation the succession to property passing

under a power of appointment, as this trust fund passed, and that this purpose has been accomplished by the language used.

The plain intent of this enactment was to change for the purpose of taxation the rule of the common law, that when a power was exercised it was deemed to relate back to the date of the original instrument creating the power. The effect of this fiction of relation, which had been given full force and effect by the Surrogate's Courts, as well as by the Court of Appeals (see Matter of Stewart, 131 N. Y., 274; Matter of Langdon, 153 N. Y., 9, and Matter of Harbeck, 161 N. Y., 211), in tax matters, had been that a large amount of property had escaped taxation, although actually vesting in possession after the passage of the Transfer Laws, under a transfer made by the donee of the power, which in reality and substance gives the grantee the property, and changes the possibility he had before into a vested estate. It was well known that many old wills contained such powers, and that unless the law was changed these dispositions under the fiction of relation would escape taxation. To remedy this evil, the law in question was passed, the intent of which, so far as taxation is concerned, was to break down this fiction and substitute the truth instead, and treat the succession as accruing when it actually does in fact; viz., when the beneficiary actually receives the possession of the property and becomes vested with it. That such is the result of the amendment of 1897, does not seem to be open to question, and it is just and fair. Why should a possible appointee of a power, who, up to the time the power is exercised, has a possibility of no value and no vested interest, not pay a tax upon the appointment or transfer, which actually gives him a vested interest of great value? It is this act which gives him something of value, whereas before he had nothing of value. Why should he escape taxation on the succession consummated and made valuable for the first time by this act, through the ancient fiction of relation, when other persons, receiving under the same will less valuable interests, must pay the tax. The amendment makes

the Transfer Tax Law uniform and fair in its operation by imposing the tax upon all valuable interests received under the will.

The Court of Appeals in *Matter of Harbeck* (*supra*), which arose before the amendment of 1897, held that by reason of the doctrine of relation, no tax could be collected because the power when exercised related back to the time of the instrument creating the power, and that no provision of the Act as then existing covered such a case. That the decision would have been different, if the amendment of 1897 had been in force, is clear, from the opinion of the Court, and under such circumstances the doctrine of relation would not apply and the succession would be taxable. The *Harbeck* case simply decides that, without the Act of 1897, the succession to this trust fund would not be taxable, and all of the exercise of the power and its relation back to the original instrument, is simply a statement of the law before the amendment of 1897. That Act changes the law in cases where the donee of the power dies after its passage, by providing in substance that the doctrine of relation shall not apply and that for the purpose of taxation the truth shall prevail, and the person shall be deemed to receive, within the provisions of the Act, a taxable transfer of property at the time the donee exercises the power, as before that time no possible appointee was able to say he was entitled absolutely to one dollar of the trust fund.

This is just and fair. The act of the donee, by which a possibility is turned into a vested estate of great value, is made for taxation the taxable transfer, and a fiction, which prevented this just and fair result, is abrogated so far as taxation is concerned.

A person has no vested right in a rule of the common law and it can be changed without violating the Fourteenth Amendment.

Munn v. *Illinois*, 94 U. S., at p. 113.

Cooley's Const. Limitations, 5th Ed., at p. 440.

State Railroad Tax Cases, 92 U. S., at p. 607.

(See extracts at end of next point.)

A fiction can be abrogated without violating the Fourteenth Amendment; for example, that the "*situs* of a debt follows the domicile of the owner."

Bristol v. *Washington County,* 177 U. S., 133.
Pullman Pal. Car Co. v. *Penn.,* 141 U. S., 427.

(*b*) The Succession Law can be made retroactive, if the law clearly shows that it was intended to apply to past successions.

Carpenter v. *Pennsylvania,* 17 How., 456.

The original succession law of Pennsylvania applied only when the property which passed *was within the State.* In 1850 an act was passed in which it was stated that the law was intended to apply to the estates of all persons, who at the time of their decease *were domiciled within the commonwealth.* William Short, a citizen of Pennsylvania, died a few months before the passage of the amendment, leaving property outside of the State, to which the original act would not apply, but to which the amendment did. The Supreme Court of Pennsylvania held that the tax could be collected and this decision was affirmed by the Supreme Court of the United States. It was claimed that the rights of the residuary legatee vested on the death of the testator and that the extension of the original act by the amendatory law to a succession already in the course of settlement involved an arbitrary change of the existing laws of inheritance to the extent of this tax, and in the sequestration of that amount for the uses of the State. In overruling these objections the Court says at page 462:

> "The rights of the donee are subordinate to the conditions, formalities and administrative control prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle n the constitution and laws of the United States to prevent it."

So, also, the Federal Succession Tax of 1864 was imposed on the disposition of real estate, past or future, by will where any person became beneficially entitled in possession or expectancy to real estate after June 30, 1864, and it was held that where the property was devised before the passage of the act to one for life, remainder to another, and the tenant for life died after the Act went into effect, the tax accrued on the interest of the remaindermen on the death of the life tenant.

Wright v. *Blakeslee,* 101 U. S., 174.

So, also, under the English Succession Duty Act of 1853 (16 and 17 Victoria, Chap. 51) the tax was imposed upon either past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person dying after the time appointed for the commencement of the Act and it was held under this Act that where a person actually obtained the possession of property by reason of the death of a life tenant occurring after the Act the succession was subject to the tax, although the rights of the person taxed accrued by reason of a will which had taken effect prior to the passage of the Act.

Wilcox v. *Smith,* 26 L. J. Ch., 596.
Atty. Genl. v. *Lord Middleton,* 3 H. & N., 125.

The *Matter of Seaman,* 147 N. Y., 69, has no bearing on this case. The persons were not taxed under powers of appointment, but took vested estates in expectancy. The Court simply decided there was nothing in the Act as then existing to show the Legislature intended it to be retrospective, *but not that an Act could not be made retrospective.* Here the intent to apply the Act retrospectively is too clear to admit of argument.

The Act of 1897 was intended by its express terms to cover just the case, which has arisen under the will of David Dows, Senior, and to subject such successions to taxation, when the beneficiary actually receives in possession a portion of the property.

But even if such an Act could not interfere with vested rights, no child of David Dows, Jr., prior to his death had any vested right in the trust fund. Their father had a discretionary power of appointment over the fund. None of his children could complain of the way he might exercise this power or claim one dollar in the trust fund until David Dows, Jr., had designated by his will the portion each was to have. At that time, and not before, each child received a vested interest in the original trust fund, as shown in the next point, and as decided by the Court of Appeals in the Vanderbilt case (Record, p. 42), and reaffirmed in this case.

VII.

Under the will of David Dows, Senior, the children of David Dows, Jr., as the possible appointees of the power given their father, acquired no vested succession, interests or rights, and these did not vest until their father exercised the power in 1899, and before that time the Power of Appointment amendment of 1897 had imposed a tax on such succession. This in no way violates the Fourteenth Amendment.

(a) It is asserted throughout the Appellants' Brief that upon the death of David Dows, Senior, his grandchildren received under his will vested rights. This is a misconception, so far as their rights as the possible appointees of the power is concerned. It is only their rights as such appointees that is involved on this appeal, because the power was exercised by their father and the right to tax them on the exercise of the power,

not its non-exercise, is before the Court. As such possible appointees they received no vested rights, but simply a possibility or chance that their father might exercise the power in their favor. Their grandfather's will vests the estate in his executors and trustees during the life of David Dows, Jr., who had a discretionary power of appointment in favor of such of his children and their issue as he might select. David Dows, Jr., under the power could give the entire estate to one child and exclude the rest; or if a child died, he could give the entire estate to this child's issue, excluding all his own children; or if he had a child born after the death of David Dows, Senior, he could give all to this child to the exclusion of those living at the death of David Dows, Senior. Under these circumstances what would become of the vested rights of those who get nothing on the exercise of the power? David Dows, Jr., had unlimited discretion as to the division of the fund among such of his children and their issue as he might select. A possible appointee under such a discretionary power acquired at most a simple chance or possibility that he might get something. The appellants call this a vested estate in the children! A child did not take under the will of David Dows, Senior, any estate or interest, legal or equitable, in possession or expectancy, in the property subject to the power. He had nothing which he could sell, devise, or that would descend to his heirs. Neither could he complain of the way his father might dispose of the property under the power. The fact that a child, as the possible appointee of the power, had nothing that he could sell, or that would pass under his will, or descend to his heirs, shows that a child received under his grandfather's will no vested estate, even in expectancy, because under the New York Statutes vested expectant estates are alienable, devisable and descendible (*Moore* v. *Little,* 41 N. Y., 66), and if real estate can be taken in payment of debts (*Sheridan* v. *House,* 4 Keyes, 569). The fact that a child, the possible appointee of the power, could not complain of the way their father might exercise the power, shows that he re-

ceived no vested estate or succession, either in possession or expectancy, at the time of the death of David Dows, Senior. If the child had a vested estate he could complain, for the New York Revised Statutes expressly declares that an expectant estate shall not be diverted by any holder of the prior estate.

(b) *The fallacy of Appellants' argument as to the "vested estate" of the grand-children.*

Appellants contend that under *Campbell* v. *Stokes*, 142 N. Y., 23, the grand-children had, at their grandfather's death, a vested right to future enjoyment of the estate. Nothing in that case supports the theory that possible appointees of the discretionary power have a vested right to receive anything. It is perfectly clear, upon the authorities hereinafter cited and upon principle, that they had nothing but possibilities and chances, until the power was exercised by their father in 1899, when for the first time they received v[illegible] rights.

That case has no application, except possibly to those portions of the will which relate to the rights of the grandchildren in case the power is not exercised. Those provisions are not before the Court, because the power was exercised and they are taxed upon the succession they received by reason of its exercise and not because of its non-exercise. Appellants' whole argument is based upon the theory that the children received vested interests on their grandfather's death, and he makes no distinction between their rights as possible appointees, which are mere possibilities, and chances, and their rights in case the power had not been exercised. Possibly in this latter case their rights may have been vested rights, liable to be defeated. Even this is extremely doubtful, because the will of David Dows, Senior, is carefully drawn and from the extracts in the Statement of Facts on this Brief, it is evident that he uses the word "vest" with great carefulness and legal precision. First, he provides his entire estate shall "vest" in his executors, and then *on the death* of his son David, Jr., he pro-

vides for the first time it shall vest in others. The estate is *vested* in executors until the death of David, Jr., and not until his death do the grandchildren receive vested interests in any portion of the estate; even in those portions they would have received had the power not been exercised. The appellants confuse the Court by not distinguishing between the rights which these children received as possible appointees of the discretionary power of appointment, and their rights in the estate in case the power is not exercised. Even if the latter case can be called vested rights certainly the former cannot be. This appeal only concerns their rights as possible appointees of the discretionary power, and these at their grandfather's death were mere possibilities or chances and not vested rights. Appellants' entire argument based upon the vested rights of these children on their grandfather's death has not the most remote bearing on the question before the Court, because until David Dows, Jr., exercised the power in 1899 the children had no vested rights, but simply chances or possibilities. If this distinction between the rights of the children on their grandfather's death as possible appointees of the discretionary power and their rights in case the power is not exercised is borne in mind, most of appellants' attack on the constitutionality of the Act falls to the ground.

The grandchildren are taxed in this proceeding for the succession, consummated by the exercise of the power of appointment, and only that portion of the act, which relates to the exercise of the power of appointment, is before this Court. What their rights would be, had the power not been exercised, and whether they vested on their grandfather's death or not, is immaterial, so far as the decision of this case is concerned. Certainly, as possible appointees of the discretionary power, they received, on the death of David Dows, Senior, no vested interest, and even if, under the clauses of the will providing for the distribution of the estate on the non-exercise of the power, they received vested interests to future enjoyment, is immaterial, for we are not seeking to tax those interests. If those portions of the will had

taken effect, the amount of the tax and the character of the taxing order would have been very different, because it is shown in the statement of facts that the amounts they would have received and the time when received vary greatly from what they received when the power was exercised, and for which they are here taxed. Any possible interest under these clauses, vested or not, were defeated on the exercise of the power by their father. If the power had not been exercised, possibly different questions would have arisen, but, it was exercised, so those questions are not before the Court, and do not aid in the determination of the question raised in the Record.

This was expressly held by the Court of Appeals in its decision, printed at fol. 83 of the Record, and is in harmony with the decision of this Court in *Packet Co. v. Keokuk*, 95 U. S., 89, where the Court says:

> "To the extent which they are affected by it "there is no valid objection to it. Statutes that "are constitutional in part only, will be upheld "so far as they are not in conflict with the Con- "stitution, provided the allowed and prohibited "parts are severable. We think a severance is "possible in this case. It may be conceded the "ordinance is too broad, and that some of its pro- "visions are unwarranted. When those pro- "visions are attempted to be enforced, a different "question may be presented."

The possible cases of double taxation suggested at pp. 45 to 47 of the Appellants Brief could not occur. The succession created by the exercise of the power would be taxed under Sub. 5, the power of appointment amendment, which was passed for that express purpose, and the State would claim the tax under that subdivision. Sub. 4 relates to the taxation of transfers, like those in Matter of Roosevelt, 143 N. Y., 120; Matter of Curtis, 142 N. Y., 219, and Matter of Hoffman, 143 N. Y., 327, which do not arise out of powers of appointment, but where owing to contingencies the transfers cannot be appraised at decedent's death. The two sub-divisions relate to different cases, and it

would seem proper to wait until the State claims the tax under both subdivisions from the same person, for the same transfer, before deciding whether it could be done. It is not raised by the present Record.

(c) *The authorities showing that the interest and succession of the children of David Dows, Jr., as possible appointees of the power, vested, not on the death of their grandfather, but on the exercise of the power by their father in 1899 and that the Fourteenth Amendment was not violated by taxing the succession created by the exercise of the power.*

(1) The title may be derived from the act creating the power, but the *time of vesting of the right* is the time of the execution of the power by David Dows, Jr., in 1899.

Matter of Vanderbilt (Record, p. 42).
Matter of Stewart, 131 N. Y., 274.
Sugden on Powers (8th ed.), Ch. 9, Sec. 3, Subd. 3.
Duke of Marlborough v. *Lord Godolphin*, 2 Ves. Sr., 61.
Southby v. *Stonehouse*, 2 Ves. Sr., 612.
Jackson v. *Davenport*, 20 Johns., 537.

In *Sugden on Powers*, (*supra*), the learned writer says:

> "It has been contended that the acts done in consequence and by virtue of an authority and pursuant thereto are the acts of the old proprietor, and OF THAT DAY WHEREIN HE IN VIRTUE OF HIS OWNERSHIP DELEGATED THAT AUTHORITY; BUT THIS LORD HARDWICKE OVERRULED."

In the *Matter of Stewart*, 131 N. Y., 274, under the will of Mrs. Stewart, Henry Hilton had a right to appoint a portion of the property among the legatees mentioned in Mrs. Stewart's will. Judge Andrews says, at page 279:

"It is doubtless true that Charles J. Clinch at

the death of Mrs. Stewart *took no legal interest in the trust fund given to Hilton.* * * * Until the power had been exercised no one of the class could maintain that he was entitled to any part of the fund. It is very clear that there was no basis for fixing a tax on the death of Mrs. Stewart on the mere possibility which Charles J. Clinch had that the power of appointment might be exercised in his favor. * * * The possibility however became a certainty when on the 16th day of January, 1890, the donee of the power of appointment exercised it in favor of members of the class mentioned in the will, and set apart to Clinch a tenth part of the trust fund. *To the extent of such application Clinch became vested as of that date with an interest in the estate of Mrs. Stewart.*"

In *Duke of Marlborough v. Lord Godolphin*, 2 Vesey, Sr., 61, the Earl of Sunderland by his will gave the use of £30,000 to the Countess (Lady Sunderland) for life, and after her decease to be divided and distributed to and amongst such of his children, and in such manner and proportions as she by any deed or will should direct and appoint. By her will she appointed £2,000 to John Spencer, and £15,000 to Lady Morpeth, children of the Earl of Sunderland, who were alive at their father's death, but who died in her lifetime after the making of her will; it was contended that the usual rule, that legacies lapse on the death of the legatees before the testator, did not apply, owing to the same doctrine of relation, but it was held that the legacies lapsed.

Lord Chancellor Hardwicke says (at p. 78):

"I admit the principle, that where a person takes by execution of a power, whether of realty or personalty, it is taken under the authority of that power; *but not from the time of the creation of that power. There is no case, that the relation shall go back for that, which is quite of another nature; and that is the point which must be contended for here, that they must take by relation so as to make them take from the time of the creation of the power; for which there is no authority; and that would be unreasonable.* * * * *This, therefore, is not a relation so as to make things vest*

from the time of the power, but according to the time of that act executing that power; not like the referring back in case of assignment in commission of bankruptcy; that is, by force of the statute, and to avoid mesne wrongful acts. * * * Consider the consequence if this was otherwise; that by such a will or instrument in nature of a will, executing such a power, anything should be held vested in testator's life, and that the reference to the power should not only be a reference to the substance of the power, but to the time of creation; it might be as well said, that Lady Sunderland might have appointed this money to them if they had died before her making the will; for it is just the same thing; * * * "

In *Southby* v. *Stonehouse*, 2 Vesey, Sen'r, 612, Chancellor Hardwicke, in laying down the rules which should govern the Court in the construction of a will made in execution of a power, and of the rights of the legatees thereunder, says (p. 612):

"Next, if they (the legatees) do survive the testator; thirdly, they can take only from the time of the death of the testator; that is the consummation of the writing; and then *they do not take as from the time of the power, but the operation and effect is only to take and vest the estate from the time of the consummation of the act by the death of the testator.*"

In *Johnson* v. *Davenport*, 20 Johns. Rep., 537, the Chancellor cites with approval (on p. 552) the decisions of Lord Chancellor Hardwicke in the above cases, and says:

"The title is derived from the act creating the power, *but the time of vesting of the right is the time of the act of execution of the power.*"

And in speaking of this distinction he says:

"And I am greatly mistaken if this be not the plain common-sense and manifest justice of the thing. Any other construction would lead to fraud and intolerable abuse."

Under all of these authorities the interest of each of the children of David Dows, Jr., in the trust fund, which is to be taxed in this proceeding, vested on the

death of their father, David Dows, Jr. If the Transfer Law was the same as it was at the time the Harbeck case was decided, it would be held that, so far as the imposition of a tax was concerned, when this property did vest it was deemed to relate back, but there could be no relating back after the vesting in this case, because, before it vested on the death of David, Jr., the legislature had passed the amendment of 1897, which provided that in this class of cases there should be no relating back for the purpose of the succession tax, and that so far as taxation of the succession to property under powers of appointment is concerned, the old common-law fiction of relation should be abrogated, and that the succession should be deemed to accrue at the time each legatee actually receives his property. The children of David, Jr., have, therefore, been deprived of no vested right by the legislation in question. They had none at the time the Act was passed and did not have until several years thereafter.

(d) *They certainly could have no vested right in this fiction of relation of the common law and in abrogating it the Fourteenth Amendment was not violated.*

The Legislature always has the right to change the common law, and when it does, the statute and not the common law must prevail.

This is especially true in cases of taxation. The common law rule is well settled that the "situs" of bonds and securities follow the domicile of the owner. That rule is more firmly established even than that contended for by appellants that all the appointee's rights come from the donor of the power. Nevertheless, this Court has held in many cases that the fiction could be abrogated, and that securities of non-residents could be taxed where physically present.

The Common law says the securities are out of the State, the tax statute says they shall be treated as property in the State for purposes of taxation. Arbitrary and unconstitutional according to appellants' argu-

ment, but as this Court holds, no violation of the constitution.

Bristol *v.* Washington County, 177 U. S., 133.
New Orleans *v.* Semple, 175 U. S., 309.
Pullman Palace Car Co. *v.* Penn., 141 U. S., 427.

No one has vested rights in rules of the Common law. As this Court says in *State Railroad Tax Cases* 92 U. S., in speaking of the rule that the situs of debts follow the domicile of the owner, at page 607:

> "But, after all, the rule is merely the law of the State which recognizes it. * * * Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

As Chief Justice Waite says in *Munn* v. *Illinois*, 94 U. S., at page 113:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In *Cooley's Constitutional Limitations*, 5th Ed., at page 440, the author says:

> "First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a

demand, or a legal exemption from a demand made by another."

All the right that any child of David Dows, Jr., had at the death of David Dows, Senior, was a possibility that his father might give him some portion of the trust fund, and an expectation that, if the tax law was not changed, he might not be compelled to pay any taxes, but these, as we have seen, did not constitute any vested right or interest in any one of the children, and before one dollar of the trust fund vested in any one of the legatees, the law had been changed and a tax imposed upon the succession.

The possibility of each child that he might receive some portion of this trust fund was certainly no more a vested right, than is the inchoate right of dower of a woman after marriage, when her husband is actually seized of the property, and nevertheless the authorities are uniform that she is deprived of no right by statute which abrogated the right of dower under such circumstances.

Randall v. *Krieger,* 23 Wall., at p. 148.
Moore v. *Mayor,* 8 N. Y., 110.

Neither is the right of these children any greater than was the right of a man on marriage to become the absolute owner of all his wife's personal property, and nevertheless the courts have held uniformly that the Legislature could change this common-law rule, and that in so doing the husband is deprived of no rights, where the property is not actually vested in possession prior to the repealing laws.

In Baker's Executors *v.* Kilgore, 145 U. S., 487, Mr. Justice Harlan says, at page 490:

"We do not doubt the validity of the act of 1879, as applied to the judgment previously rendered against Scruggs. The particular profits of the wife's estate here in dispute had not, when that act was passed, come to the hands of the husband. They were not, at that time, in existence, nor in any legal sense, vested in him. Nor were they ever vested in him. He had a mere expectancy

with reference to them when the act was passed. Moreover, his right, prior to that enactment, to take the profits of his wife's estate did not come from contract between him and his wife or between him and the State, but from a rule of law established by the legislature, and resting alone upon public considerations arising out of the marriage relation. It was entirely competent for the legislature to change that rule in respect, at least, to the future rents and profits of the wife's estate. Such legislation is for the protection of the property of the wife, and neither impairs nor defeats any vested right of the husband. * * * If the act of 1879 did not infringe any vested right of the husband, much less did it infringe any right belonging to his creditors."

These cases all show that the Legislature had the power to pass the Power of Appointment amendment, and subject to taxation these successions under power of appointment, and that in so doing it violated no vested rights of the children of David Dows, Jr., and no provision of the Fourteenth Amendment.

VIII.

Equal protection of the law is not violated by the Power of Appointment Amendment, because it does not create a mere arbitrary classification and treats all persons alike under like circumstances and conditions.

The provisions of the 14th Amendment, which prohibits any state from denying to any person within its jurisdiction, the equal protection of its laws, as applied to the subject of taxation, require, as we have seen, that all taxations shall be equal and uniform, in respect to all persons, under like circumstances and conditions.

To determine whether the act is uniform and equal,

it is necessary to ascertain the sphere of operation of the act. If within the sphere of operation it affects all persons equally and uniformly under like circumstances and conditions, it is not obnoxious to the provision of the constitution. But on the other hand, if it creates a burden on some persons and not upon others, under the same circumstances and conditions, it violates this constitutional provision. It cannot be denied that the Legislature may classify subjects for the purpose of taxation, provided it does so, not arbitrarily but owing to an intrinsic difference of circumstances and conditions.

It is argued there is an unjust discrimination between the persons taking under the power of appointment, in favor of those who may have, under other circumstances, received property under the original will.

The fallacy of the argument lies in the assumption that the two transfers arise under like circumstances and conditions. The difference in the nature of the transfers admit of difference in classification.

The act in question does not divide persons, receiving a transfer under the same conditions and circumstances, into different classes, and subject one to taxation and the other not. It treats all of the same class alike and makes the succession of each taxable. Its object was to subject to taxation those incomplete successions, which under the original act were escaping taxation. The act making the exercise of the power the transfer or the taxable succession does not, by an arbitrary definition, impose upon certain persons taxes from which other persons under the same conditions are exempt. Each and every person receiving property under the exercise of a power of appointment is taxable in the same way and at the same rate. The act is therefore uniform and equal in its operation.

The legislation, by making the exercise of the power a transfer and by subjecting persons taking under its exercise to a succession tax, cannot be considered as invidiously discriminating against persons thus receiving their vested interests under the exercise of the power, in favor of persons who received at the time of the original testator's death a legacy of a certain amount,

which vested and was actually received in their possession at that time. The circumstances and conditions of the two classes are very different, and there is an essential difference between the rights of successions received by each class. The one class received a completed succession at the original decedent's death, and the property was theirs absolutely at that time to do with as they wished. No one against their will could take it away from them. They could sell it, devise it, or, on their death, it would pass to their heirs. On the other hand persons taking under a power had at the most but a possibility or a chance that they might get something, if their influence with the donee of the power was sufficient to get him to exercise the power in their favor. They had nothing they could sell, devise or that would pass to their heirs. The act of the donee of the power made the succession complete, and was the vital act giving force and effect to the transfer, and on its exercise the possible appointee first acquired the property and a valuable succession. In the nature of things there is no similiarity between the two classes of cases. They belong to different classes and the legislature in making a discrimination between them, violates no rule of classification. The different nature and character of the successions justify the classifications which the legislature has made. There is no discrimination between persons brought within the class defined in the act. The successions of such persons, being so entirely dissimilar, in vital respects, from that of other persons, whose rights vested absolutely on the death of the creator of the power, that there is no violation of equality and uniformity of taxation.

The classification is based upon reasonable grounds, and upon a difference which bears a just and proper relation to the attempted classification; and is not a mere arbitrary selection. As previously shown, prior to the exercise of a power of appointment, the possible appointee had no vested right in the property and did not have the right to one dollar of it. The will of the donee executing the power, as a matter of fact gave him fixed rights to a large fortune. To prove he was entitled to any part of the trust fund, he must resort to

the will executing the power, and to the transfer thus made, which was valuable to him. There is nothing unreasonable in declaring that this transfer, and his relationship to the person who makes it, shall be the taxable succession. It taxes with reference to the person who, as a matter of fact and without regard to legal technicality, actually gives the valuable right. The amendment of 1897 simply puts the truth in place of fiction, for as the Court of Appeals says in the case:

> "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives the grantee the property passing under it."

The arguments and cases cited in the previous points show the peculiar character of transfers created by the exercise of a power of appointment, and support the argument, that, by taxing such transfers, no unjust and arbitrary classification is made, and show that a classification based on such transfers is reasonable and violates no provisions of the Fourteenth Amendment.

(b.) Whether the relationship to the creator of the power, and not to the person executing it, should determine the rate of tax, is not raised on this appeal. In either case the persons taxed in this proceeding would only pay at the rate of 1 %, and if other persons might have to pay more, as the rate is determined by reference to one or the other, is no concern of the appellants. They are not injured.

Supervisors v. *Stanley*, 105 U. S., 310.

IX.

The provisions of the Transfer Tax Law for the collection of the tax, do not violate the Fourteenth Amendment.

(*a*) The method of collection provided by the act affects all transfers.

§222 provides, "all taxes imposed by this article shall be due and payable at the time of transfer, except as hereinafter provided." The act then provides in the same section that taxes upon the transfer of estates which are contingent so that the fair market value cannot be determined at the time of transfer shall be due and payable when the person beneficially entitled thereto shall come into the actual possession or enjoyment thereof.

The Court of Appeals held and the appellants admit (see their Brief, p. 54) that they fall within the first class and that the transfer occurred when the power was exercised on January 13th, 1899. This construction of the statute by the State Court is binding on this Court.

§223 provides for a rebate of 5%, if the tax is paid within six months, but if not paid until eighteen months they shall bear interest at 10% per annum, which, for certain reasons, can be reduced to 6% per annum. §222 makes the tax a lien on the property transferred until paid, and the person receiving the transfer and the executor and trustees personally liable for the tax. §224 gives the executor power to sell enough of the property to pay the tax; and power to collect it from the legatee, and §226 of the act authorizes the taxpayer or the executor to give a bond to pay the tax and interest, if they wish to postpone its payment until the property is actually received in their physical possession.

The values of the remainder of the children of David Dows, Jr., have been valued, as of the date of the transfer, January 13th, 1899, by deducting the

value of the prior life estates as provided for by §230 of the act. The tax on the present worth value of these remainders has been ascertained, and the Court of Appeals, construing the different provisions of the act, has held the taxes were due at the time of the transfer, viz., January 13th, 1899.

Appellants' claim is that if they neglect to pay the taxes for a number of years the penalty will amount to a large sum, and therefore the 14th Amendment is violated.

These penalties can all be avoided by the prompt payment of the tax. If they don't pay them it is their own fault, and therefore the alleged unconstitutionality would arise, not out of the act itself which is uniform, and affects all alike, but out of the way the appellants voluntarily use the act. The supposed cases stated in their brief are of no weight, arising as they do from the voluntary act of taxpayer, and it is difficult for us to see how they can ever arise. The record does not show they have arisen in this case.

> *"The infliction of penalties for non-payment of taxes is a usual and legitimate mode of compelling prompt payment of taxes and the amount of the penalty is within the legislative discretion and does not violate the 14th Amendment."*
>
> *Western Union Telegraph Co.* v. *Indiana*, 165 U. S., 307.

(b) The basis of the appellants' argument seems to be that it is a hardship for a remainderman to pay the tax before he receives the physical possession of his remander, but hardship alone does not make an act unconstitutional, and in the *State Railroad Tax Cases*, 92 U. S., at p. 605, Mr. Justice Miller says, "but individuals do not escape taxation on their real and personal property because insolvent."

(c) In what respect the 14th Amendment is violated by these provisions for collecting taxes which apply to the collection of all taxes on vested estates, it is difficult to see. If penalties for the non-payment of taxes

could not be put in Tax Acts, then the taxes never would be paid.

The remainders are not contingent or liable to be defeated in any way, but are absolute vested remainders. Th order virtually makes the tax accrue on January 13th, 1899, and this is right. The act says the tax shall accrue on the transfer of the property and these remainders were transferred and vested absolutely on the day fixed, January 13th, 1899. The remaindermen are only taxed on the present worth value of these remainders, and not on the amount they will eventually receive. The value of the remainders have been ascertained by deducting the value of the life estate, so that the remainderman is only taxed on the present worth value of the remainder. No exception is taken to this valuation. There is no reason why the payment of the tax should be suspended, which is only done when owing to some contingency or the happenng of some event, it is impossible to ascertain who will ultimately receive the estate. There is no uncertainty in this case, because on the death of David Dows, Jr., each of his sons received by virtue of the appointment this vested remainder. He could sell it, or devise it by his will, and, on his death intestate, it would pass to his next of kin. To be sure the tax on the present value of the remainders accrued on January 13, 1899, and if not paid within the time fixed by the Statute would bear interest.

The question of how the tax shall be paid and out of what funds, is not before the Court, but there is no difficulty about the Trustees paying the Tax. The act says that they can collect it from the beneficiaries. Each remainderman has the income of one-third of the entire estate. The trustees have this income of each remainderman in their possession, and can pay the tax fixed on each child's life estate and remainder out of that child's income. There is no objection to this. Each child's property is used to pay his own tax. If the Trustees do not wish to pay the tax until the remaindermen actually enter into possession of their remainders, they can give a bond as provided in §226 of the Act to

pay the Tax and interest from its accrual. There is no occasion for so doing, because as previously shown, they have in their possession money of the remaindermen, which they can use for the payment of the tax. If the Trustees do not wish to use a child's income to pay that child's tax, the Act gives them the power to sell enough of the remaindermen's interest in the Estate to obtain the necessary money. Each child's interest in remainder vested absolutely on the death of their father, on January 13th, 1899, as stated in the order. There was no contingency about the remainders, but they were absolute legal estate, and not liable to be defeated by any contingency. Their father's Will so provides (fol. 63). Each remainderman could immediately sell his remainder interest, or could devise it by his will, and, on his death intestate, it would pass to his next of kin. Each child's remainder interest vested absolutely on the death of their father on January 13th, 1899, and there is no constitutional objection against the State imposing the tax upon the interest at the time it vests.

X.

The Fourteenth Amendment is not violated by the decision of the Court of Appeals, that the Trust Funds being personal property when they vested in the children of David Dows, Jr., in 1899, by their father's exercise of the power of appointment, that succession is taxable, even if the Trust Funds were real estate when David Dows, Sr., died in 1890.

It is claimed that because a large portion of the property passing under the Will of David Dows, Senior, to his Trustees, in 1890, was Real Estate, and because

the proceeds of this Real Estate comprised a large portion of the personal property passing to the children of David Dows, Jr., by his exercise of the power of appointment, in 1899, that this personal property, so passing and vesting in the children under their father's Will in 1899, cannot be appraised, because Real Estate passing to lineal descendants is non-taxable.

(*a*) The fallacy of appellants' argument is that it treats the transfer as taking place in 1890, when, as we have seen, the taxable transfer occurred in 1899, when the power was exercised. The character of the property at the time of the taxable transfer controls, and at that time it was personal property.

(*b*) This constitutional question was not raised before the appraiser (see objections, III, Record, p. 22). Neither was it raised in the notice of appeal to the Surrogate (Record, p. 27, sub. III). The general clause at the end of the notice of appeal claims that the provisions are repugnant to the Constitution of the United States "as hereinabove set forth," and sets up and claims a privilege under the 14th Amendment "as aforesaid" (Record, p. 29, fol. 49). This refers simply to the subdivisions, I & II, of the notice of appeal, where a violation of the 14th Amendment is expressly claimed, but has no such application to Subdivision III, where no such claim is made. The notice of appeal to the Court of Appeals is in the same form and is defective for the same reason (Record, p. 35, Subdivision III and fol. 66). The constitutional question was not raised until in the Assignment of Errors (p. 53, II). It is well settled, that this is too late, and, therefore, no Federal question is raised.

(*c*) The Court of Appeals said, "as we have held that it was the execution of that power, which subjects grantees under it to the transfer tax, it follows that the condition or form of the property at the time of such execution must control" (Record, p. 46, fol. 84). If the power of appointment amendment is held

constitutional by this Court and the question now considered does not arise unless the act is valid, then the above construction given to the act by the Court of Appeals must be adopted by this Court, under the authorities cited in Point I of this Brief.

(*d*) On the merits there is no force in appellants' contention. For the purpose of taxation the actual character of the property at the time of the taxable transfer determines its taxability. The taxable succession in the grandchildren to the property accrued, not when David Dows, Senior, died in 1890, but when their father exercised the power in 1899, and then the property held by the Trustees first passed to and vested in the grandchildren. If Real Estate passed at that time, there could be no tax, but Real Estate did not pass to the grandchildren, because at that time the Trustees held no Real Estate. Under the powers contained in the Will of David Dows, Senior, the Real Estate had been sold years before, and the Trustees held only personal property, and it was this personal property, which then vested in the grandchildren by virtue of the exercise of the power. Under the Will of David Dows, Senior, these grandchildren never had any title to the Real Estate. It was in the Trustees and the Will expressly provides that only on the death of David Dows, Jr., shall the property *vest* in such of his children as he may appoint. What vested in the children of David Dows, Jr., in 1899, under the appointment in their father's Will, was the property then held by the Trustees of their grandfather's Will, and this was personal property and therefore taxable. The succession thus created, and taxed under the power of appointment amendment, was in the personal property, because that was the only kind of property in the possession of the Trustees.

The actual character of the property at the time the taxable transfer accrues determines its taxability. Fictions by which the law sometimes treats Real Estate as personal property, or personal property as Real Estate, cannot be resorted to, either to make a succession

taxable or exempt. Thus Real Estate, absolutely directed to be converted into personal property, cannot be taxed when the proceeds are given to direct heirs. The fiction of equitable conversion has no place in a tax law.

Matter of Sutton, 5 App. Div., 298; affirmed on the opinion below, 149 N. Y., 618.
Matter of Swift, 137 N. Y., 77.

The converse of that proposition must be equally true, and the doctrine cannot be resorted to for the purpost of exempting property from taxation.

Matter of Dows, 167 N. Y., at p. 232, Record, p. 46, fol. 46.

The act itself provides that "when a person exercises a power of appointment, such appointment when made shall be deemed a taxable transfer in the same manner, as though *the property to which such appointment relates,* belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will."

The transfer taxed in this case accrued in 1899, under the act by virtue of the exercise of the power in the Will of David Dows, Jr., and did not accrue by virtue of the Will of his father, who died, in 1890. The fiction of relation is abolished for all purposes. The act provides that the transfer must be treated as though David Dows, Jr., was the absolute owner "of the property to which *such appointment relates* and it had been bequeathed by him." To what property does the appointment relate? Certainly not to Real Estate, because the Trustees held none. It had been sold years before. It relates to the Trust Fund held by the Trustees in its condition at the time the power was exercised. This was personal property, and this personal property, and nothing else, passed to the children of David Dows, Jr., on the exercise of the power by their father and is therefore taxable. If David Dows, Jr., had been the absolute owner of this personal property held by the Trustees, and it passed

The language of Mr. Justice Harlan in *Lake Shore and Mich. Southern Railroad Co.* v. *Ohio*, 178 U. S., at p. 308, seems very applicable:

> "Imaginary cases are put for the purpose of showing what might be done by the State that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are opposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be a legitimate exercise of the police powers of the State, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

JABISH HOLMES, Jr.,
EDGAR J. LEVEY,
Of Counsel for the Defendants in Error.

30240

Supreme Court of the United States.

No. 351.—October Term, 1901.

Alexander E. Orr and others, Plaintiffs in Error, *vs.* Theodore P. Gilman, Comptroller of the State of New York, and Bird S. Coler, Comptroller of the City of New York.	In error to the Surrogate's Court of the County of New York, State of New York.

[January 6, 1902.]

David Dows, Senior, a citizen and resident of the city and State of New York, died March 30, 1890, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of New York County on April 14, 1890. The will provided that the legal title to the property mentioned and described in the sixth clause thereof should vest in the executors' names as trustees during the lifetime of testator's son, David Dows, Jr., with power to manage and control the same, and with the duty to pay the net income therefrom to said David Dows, Jr. The will further provided that upon the death of David Dows, Jr., the property should vest absolutely and at once in such of his children him surviving, and the issue of his deceased children as he should by his last will and testament designate and appoint, and in such manner and upon such terms as he might legally impose. In and by the eighth clause or paragraph of his said will, David Dows, Senior, devised and bequeathed the legal title to his residuary estate to his executors as trustees, to hold and manage the same, one-eighth part in trust during the lifetime of testator's widow, and one-eighth part in trust for each of testator's seven children—one of whom was the said David Dows, Jr. It was made the duty of the trustees to pay over the net income to the respective persons named during their respective lives, and it was provided that, upon the death of each of said persons, the said one-eighth part of the residuary estate, with any accumulations and profits, should vest absolutely and at once in such of his or her children, or the issue of such children, as he or she might by his or her last will and testament designate and appoint, and

in such manner and upon such terms as he or she may legally impose. It was provided, in both the sixth and eighth clauses, that if the legatee for life shall die intestate, then the property should vest absolutely and at once in his or her children surviving, share and share alike.

David Dows, Junior, died January 13, 1899, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of Westchester County, New York, by the third paragraph or clause whereof, in the exercise of the power of appointment given him in his father's will, he provided that the property mentioned and described in the said sixth and eighth clauses of the will of David Dows, Senior, should vest upon his death in his three children, David, Robert and Kemeth, in a manner therein described.

On October 31 1900, Bird S. Coler, Comptroller of the city of New York, and Theodore P. Gilman, Comptroller of the State of New York, filed a petition in the Surrogate's Court of New York County, in which, after reciting the foregoing facts, they alleged that the transfer of funds and property of which David Dows, Junior, had the life use and over which he had exercised the power of appointment given him in his father's will, was taxable, and they therefore prayed for the appointment of a transfer tax appraiser, in order that the transfer tax might be duly assessed and imposed. Thereupon Charles K. Lexow was so appointed, and on January 31, 1901, after having given notice to the said Comptrollers and to the executors and trustees of the last will of David Dows, Senior, and to the executors of the last will of David Dows, Junior, and to the guardians of the minor children of David Dows, Junior, the appraiser filed in the Surrogate's office a report of his valuation of the interests of the three sons of David Dows, Junior, under the respective wills of their father and grandfather. Certain exceptions to this report were filed on behalf of the executors and guardians, the nature of which will hereafter appear. Thereafter, on February 15, 1901, the Surrogate, on the basis of the report of the said appraiser, assessed a transfer tax of upwards of $7,000 against each of the respective interests of the three sons of David Dows, Junior. The exceptions to the appraiser's report and to the assessment were, on March 6, 1901, after argument by counsel, overruled, and the Surrogate entered the following order and judgment:

"It is ordered, adjudged and decreed that said report and order so appealed from be and they are hereby affirmed, and that the date when the transfers now taxed were effected was January 13, 1899, that date being fixed because it was the date of the death of David Dows, Junior, the donee of the power contained in the will of David Dows, Senior."

An appeal was taken from the order and decree of the Surrogate to the appellate division of the Supreme Court of New York, and by that court, on March 22, 1901, the order of the Surrogate was affirmed. On appeal duly taken, the Court of Appeals of the State of New York, on May 17, 1901, affirmed the order and judgment of the appellate division of the Supreme Court, and the judgment of the said Court of Appeals and the record of the proceedings were remitted into the Surrogate's court of New York, to be enforced according to law, and the judgment of the Court of Appeals was on May 28, 1901, made the judgment and order of the Surrogate's court. And on June 13, 1901, a writ of error to that judgment was allowed, and the cause was brought to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

This is the case of a so-called transfer tax imposed under the laws of the State of New York. The various contentions of the plaintiffs in error, attacking the validity of the tax, were overruled by the courts of the State, and the cause is now before us on the general proposition that by the proceedings the plaintiffs in error, or those whom they represent as trustees and guardians, have been deprived of the equal protection of the laws of the State of New York, their privileges and immunities as citizens of the United States have been abridged, and their property taken without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and likewise, as to a portion of the property affected, in violation of section 10 of article 1 of the Constitution of the United States.

The first question presented arises out of subdivision 5 of section 220 of the tax law of the State of New York, which reads as follows:

"5. Whenever any person, or corporation, shall exercise a power of appointment, derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer, taxable, under the provisions

of this act, in the same manner as though the property, to which such appointment relates, belonged absolutely to the donee of such power, and had been bequeathed, or devised, by such donee by will; and whenever any person, or corporation, possessing such a power of appointment, so derived, shall omit, or fail, to exercise the same within the time provided therefor, in whole or in part, a transfer, taxable under the provisions of this act, shall be deemed to take place to the extent of such omissions, or failure, in the same manner as though the persons, or corporations, thereby becoming entitled to the possessions, or enjoyment of the property to which such power related, had succeeded thereto, by a will of the donee, of the power failing to exercise such power, taking effect at the time of such omission, or failure."

This enactment became a law on April 16, 1897. David Dows, Senior, died March 30, 1890, leaving a will containing a power of appointment to his son, David Dows, Junior, which will was duly admitted to probate by the Surrogate's court on April 14, 1890. David Dows, Junior, died on January 13, 1899, leaving a will, in which he exercised the power of appointment given him in the will of his father, and apportioned the property, which was the subject of the power, among his three sons, who are represented in this litigation by the plaintiff in error.

It is claimed that, under the law of the State of New York as it stood at the time of his death, in 1890, David Dows, Senior, had a legal right to transfer, by will, his property, or any interest therein, to his grandchildren, without any diminution, or impairment, then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred, and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before.

We here meet, in the first place, the question of the construction of the will of David Dows, Senior. Under and by virtue of that will, did the property, whose transfer is taxed, pass to and become vested in the grandchildren, or did the property not become vested in them until, and by virtue of the will of David Dows, Junior, exercising the power of appointment? The answer

to be given to this question must, of course, be that furnished us by the Court of Appeals in this case, (*Matter of Dows*, 167 N. Y. 227):

"Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Senior, gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the request of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will."

It will be perceived that, in putting this construction upon the will of David Dows, Senior, the Court of Appeals not merely construed the words of the will but, by implication, applied to the case the provisions of the subdivision 5 of section 220, under which the transfer tax in question was imposed, and thus construed that tax law and affirmed its validity.

While it is settled law that this court will follow the construction put by the State courts upon wills devising property situated within the State, and while it is also true that we adopt the construction of its own statutes by the State courts, a question may remain whether the statute, as so construed, imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States. And such is the contention here.

This court has no authority to revise the statutes of New York upon any grounds of justice, policy or consistency to its own constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the State.

In *Carpenter* v. *Pennsylvania*, (17 How. 456,) the question arose as to the validity, in its Federal aspect, of a law of the State of Pennsylvania imposing an inheritance tax on personal property

which had passed into the possession of an executor before the passage of the act, and which was held by him for the purpose of distribution among the legatees, who were collateral relatives to the decedent. The act was held valid by the Supreme Court of the State, and was brought up to this court by a writ of error, where it was contended that such an act was in its nature an *ex post facto* law, which took the property of an individual to the use of the State, because of a fact which had occurred prior to the passage of the law, and also that the law, in its retroactive effect, impaired the obligation of a contract, in that it was alleged to absolve the executor from his contract, implied in law, to pay over the legacies to those entitled to them, just to the extent that the law required him to pay to the State. The opinion of the court, delivered by Mr. Justice Campbell, was, in part, as follows:

"The validity of the act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is that the application of the act to a succession already in the course of settlement, and which had been appropriated by the last will of decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the State; that the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents, and the property taxed was also beyond the State; and that the State has employed its power over the executor and the property within its borders, to accomplish a measure of wrong and injustice; that the act contains the imposition of a forfeiture or penalty, and is *ex post facto.*

"It is, in some sense, true that the rights of donees under a will are vested at the death of the testator; and that the act of administration which follow are conservatory means, directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. But, until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the

State in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, think fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. (*Ennis* v. *Smith*, 14 How. 400.)

"The act of 1860, in enlarging the operation of the act of 1826, and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And as the Supreme Court of Pennsylvania has well said, 'in establishing its peculiar interpretation, it (the legislature) has only done indirectly what it was competent to do directly.' But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an *ex post facto* law within the tenth section of the nineteenth article of the Constitution. The debates in the Federal convention upon the Constitution show that the terms '*ex post facto* laws,' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. (3 Mad. Pap. 1399, 1450, 1579.) This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. (*Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*, 6 Cranch, 87; 8 Pet. 88; 11 Pet 421.)"

It is true that this case was decided before the adoption of the Fourteenth Amendment, but we think it correctly defines the limits of jurisdiction between the State and Federal governments in respect to the control of the estates of decedents, both as they were regarded before and have been regarded since the adoption of the Fourteenth Amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the States in regard to the devolution of estates, or to the extent of the taxing power over them.

In *In re Kemmler*, (136 U. S. 436,) it was stated by the present Chief Justice that—

"The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people.

The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty, and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. (*United States* v. *Cruikshank*, — U. S. 542; *Slaughter House Cases*, 16 Wall. 36.)"

It was said in *DeVaughn* v. *Hutchinson*, (165 U. S. 566,) that "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

In *Clarke* v. *Clarke*, (178 U. S. 186,) the proposition was again announced, as one requiring only to be stated, that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy, and that in this court the local law of a State is the law of that State as announced by its court of last resort.

In *Magoun* v. *Illinois Trust Co.*, (170 U. S. 283,) the validity of a law of the State of Illinois imposing a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired, was assailed in the courts of Illinois as being in violation of the Constitution of that State, requiring equal and uniform taxation. The State court having decided that the progressive feature did not violate the constitution of that State, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution. But these contentions were held by this court to be untenable.

See, likewise, *Knowlton* v. *Moore*, (178 U. S. 41,) and *Plummer* v. *Coler*, (178 U. S. 115,) wherein were considered the nature of inheritance tax laws and the extent of the powers of the States and of Congress in imposing and regulating them.

In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed

by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the State, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation.

But, it is further urged, that the tax law of the State of New York, section 221, expressly exempts from taxation, or charge, all real estate passing to lineal descendants by descent or devise, and all such descendants so taking title to real estate from ancestors, and it is said that under the interpretation of this law by the courts of the State of New York all property which was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the ancestor who owned it, and the property in the meantime has been converted into cash or securities.

It is true that the property described in the sixth paragraph of the will of David Dows, Senior, was real estate, but under the powers conferred in the will of David Dows, Senior, the trustees had converted the real estate and held the proceeds as personal property before the death of David Dows, Junior, and it was this personal property which became vested in the grandchildren under the exercise of the power of appointment. The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the Federal Constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the Court of Appeals respecting the question was wrong, it was an error which we have no power to review.

Another objection made to the judgment of the Court of Appeals, affirming the Surrogate's order, is that the tax imposed

upon transfers made under a power of appointment is a tax upon property and not on the right of succession, and that, as a portion of the fund was invested in incorporated companies liable to taxation on their own capital, and in certain bonds of the State of New York, and in bonds of the city of New York exempt by statute from taxation, such exemption formed part of the contract under which said securities were purchased, and the tax imposed and the proceedings to enforce it were in violation of section 10 of article 1 of the Constitution of the United States forbidding the States to pass laws impairing the obligation of contracts.

The Court of Appeals overruled the proposition that the transfer tax in question was a tax upon property and not upon the right of succession, and held that when David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will and that the charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will.

In reaching this conclusion the Court of Appeals cited not only various New York cases but several decisions of this court, the principles of which were thought to be applicable. (*Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Plummer* v. *Coler*, 178 U. S. 115; *Knowlton* v. *Moore*, 178 U. S. 41; *Murdock* v. *Ward*, 178 U. S. 139.)

We think it unnecessary to enter upon another discussion of a subject so recently considered in the cases just cited, and that it is sufficient to say that, in our opinion, the Court of Appeals did not err when it held that a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the State, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States.

A further contention is made that the legatees or devisees of the remainders created by the will of David Dows, Junior, are not legally subject to taxation until the precedent estates terminate and the remainders vest in possession.

The Court of Appeals held that the doctrine invoked had no application to the remainders given to the sons of David Dows

Junior; that they are absolute and not subject to be divested or to fail in any contingency whatever; that by statute they are alienable, devisable, descendible, and if the property were real estate, they could be sold on execution against their owners; that by the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation; and that, therefore, they are subject to present taxation.

These views of the Court of Appeals must be accepted by us as accurate statements of the law of the State; and though it is claimed in the brief of counsel for the plaintiffs in error that such a construction of the transfer tax law brings it into conflict with the Fourteenth Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of State law, expounded by State courts. The laws and the construction put upon them apply equally to all persons in a like situation, and cannot be regarded as conflicting with the provisions of the Federal Constitution. (*Magoun* v. *Illinois Trust Co.*, 170 U. S. 283.)

Other contentions made in the brief of counsel for the plaintiffs in error seem, so far as our jurisdiction is concerned, to be phases of those heretofore considered and thereby disposed of.

The judgment of the Court of Appeals of the State of New York affirming the judgment of the Surrogate's Court of New York County is

Affirmed.

Mr. Justice HARLAN concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.